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In the Supreme Court of the United States

October Term, 1981

SUNTEX DAIRY, ET AL., *Petitioners,*

vs.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE OF THE UNITED STATES, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether under the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. §601 *et seq.*) the Fifth Circuit correctly held that in this suit the Secretary of Agriculture's determinations (1) that the lack of handler approval tended to prevent the effectuation of the declared policy of the Act and (2) that the issuance of milk marketing order was the only practical means pursuant to the declared policy of the Act of advancing the interests of the producers:

   (a) were agency actions entrusted to the Secretary's unlimited discretion, and

   (b) were not subject to judicial review on either the "substantial evidence" standard or the "arbitrary, capricious or abuse of discretion" standard, or on both standards, and

   (c) could be judicially reviewed only for "procedural irregularity or fraud"?

2. Whether, in determining that six separate federal milk marketing orders should all be merged into a single order, the Secretary of Agriculture could include the Corpus Christi Order, one of the separately existing orders, into the merged order even though he found it had little intermarket relationship with some of the other orders to be merged, based on the proposition that an extensive interfacing of one market with each of the other five markets was not necessary?

LIST OF ALL PARTIES

The parties to this proceeding are as follows. The Petitioners are Suntex Dairy, Schendel Jersey Farms, Cliston V. Harborth, Harley R. Broadwater, Welton Gorbet, Knolle Cattle Co., A. R. Solomon, Ernesto Villarreal, Jr., Vicente Saenz, Roberto Villarreal, Johnson Jersey Farm, Jess R. Richter, C & H Farms, Galloway Dairy Farms, Inc., Bill Richter, Jr., Mrs. E. L. Reynolds, Robert G. Spear Farm, Creekside Jersey Farm, P. F. Wied, Clarence F. Schendel, Lyssy Dairy Farms, Knolle Jersey Farm, H. P. Knolle Farms, Welton Knolle, R. E. Knolle, Sandia Agricultural Enterprises, Southwest Dairy, Inc., and Hygeia Dairy Company. In compliance with Rule 28.1, Rules of the Supreme Court, a listing of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each corporate Petitioner is as follows: Cohyco, Inc., is the parent company of Petitioner Hygeia Dairy Company, owning all of its stock.

The Secretary of Agriculture of the United States, John R. Block, is the Respondent. These were all of the parties to this case in the United States Court of Appeals for the Fifth Circuit. However, both the Fifth Circuit and the United States District Court permitted Associated Milk Producers, Inc., to file an *amicus curiae* brief in support of the Secretary of Agriculture and heard oral argument from its counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, Suntex Dairy, et al., respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported as *Suntex Dairy v. Block*, 666 F.2d 158 (5th Cir. 1982), and appears in the Appendix hereof as Appendix A. (A1-A20.) The opinion of the United States District Court for the Southern District of Texas dated August 4, 1980, is not reported and appears as Appendix B hereof. (A21-A28.) An opinion of the United States Court of Appeals in a prior appeal in this cause is reported as *Suntex Dairy v. Bergland*, 591 F.2d 1063 (5th Cir. 1979),

and appears as Appendix C. (A29-A42.) In regard to such prior appeal, the opinion of the United States District Court for the Southern District of Texas dated January 28, 1977, is not reported and appears as Appendix D. (A43-A52.) Involved in this suit is the Decision on Proposed Amendments to Marketing Agreements and to Orders dated May 2, 1975, and the accompanying Order Amending and Merging the Orders, published May 7, 1975, in the Federal Register, Volume 40, page 20,004 *et seq.* (Appendix E at A53-A223). The subsequent Order Amending and Merging Orders dated May 28, 1975, was published in the Federal Register of May 30, 1975, Volume 40, page 23,437 *et seq.* (Appendix F at A224-A304.)

JURISDICTION

The judgment of the Court of Appeals was entered January 21, 1982. (Appendix G at A305.) A timely petition for rehearing and a suggestion for rehearing en banc were denied February 17, 1982 (Appendix H at A306, A307), and this petition for a writ of certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves the Agricultural Marketing Agreement Act of 1937, the pertinent portions of which, 7 U.S.C. §§602, 608b and 608c, are reprinted in Appendix I. (A308-A337.) Also involved and reprinted in Appendix I are 5 U.S.C. §§701 and 706. (A337-A339.)

STATEMENT OF THE CASE

The Petitioners brought this suit in the United States District Court, Southern District of Texas, against the United States Secretary of Agriculture. They complained of the Texas Marketing Area Milk Market Order which terminated or abolished six separate milk marketing orders, including the Corpus Christi Order and which merged into a single order the areas previously included within the six orders, plus some additional areas. Prior to the promulgation of the challenged Order in 1975, the Petitioners, who are independent milk producers, were in the Corpus Christi Federal Milk Marketing Order. Under the merged Order the Petitioners receive a lower minimum or "blend" price for their milk than they received under the separate Corpus Christi Order. (App. A at A4-A8.)

In the promulgation process of the Order in question, a public hearing was held and a substantial amount of evidence submitted. Thereafter, the Secretary considered the hearing record and made extensive findings, one of which was that the proposed Order tended to effectuate the declared policy of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §601 *et seq.* (the "Act"). A few weeks later, the same finding was recited in connection with the final Order. (App. E at A217, A221; App. F at A225.) In the final Order the Secretary also recited determinations that lack of handler approval of a marketing agreement tended to prevent the effectuation of the declared policy of the Act and that the issuance of the new Order was the only practical means pursuant to the declared policy of the Act of advancing the interests of the producers. (App. F at A226.)

The Petitioners sued the Secretary charging, *inter alia*, that the "tended to effectuate" finding, the "only practical

means" finding and the "tended to prevent the effectuation" finding, insofar as they related to the part of the new Order terminating the Corpus Christi Order, were not supported by substantial evidence and said findings and Order were arbitrary, capricious and constituted an abuse of discretion.[1] The jurisdiction of the District Court was invoked under 28 U.S.C. §1331.[2] Also invoked were 5 U.S.C. §§702, 703 and 704. Petitioners prayed that the Order in question be in all things set aside, or, in the alternative, that the Corpus Christi Order not be included within the Texas Marketing Area Order, and further, that Petitioners recover damages.

The District Court, after first staying the implementation of the new Order as it applied to the Corpus Christi Order, entered an agreed order which lifted the stay on condition that if the new Order is held to be invalid and if Petitioners establish that they are entitled to damages because of such Order, such damages will be paid out of the producers settlement fund of the new Order. (App. D at A44.) The District Court granted the Secretary's motion for summary judgment, holding that Petitioners did not have standing to seek judicial review on the substantive merits of the Secretary's determinations that a new Order should be promulgated. (App. D at A45-A49.) The United States Court of Appeals for the Fifth Circuit reversed and

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1. The Petitioners also averred that the referendum of producers held in connection with the promulgation of the new Order was improperly conducted because a large milk marketing cooperative, Associated Milk Producers, Inc., was allowed to vote as a bloc all of the votes of the producers that constituted its members in violation of an antitrust injunction previously entered by a United States District Court in Missouri.

2. In its opinion the District Court commented: "The District Courts of the United States are vested with jurisdiction to review the Secretary of Agriculture's rulings made in response to objections to the orders issued by him. 7 U.S.C. §608c(15)(B)." (App. B at A23, footnote 3.)

remanded, ruling that Petitioners, as milk producers, did have standing to bring this substantive attack on the Order.[3] (App. C at A35-A40.)

Upon remand the District Court again granted judgment in favor of the Secretary. The Court held that the evidence supporting the Secretary's decision to merge the six orders was substantial and that the Secretary's conclusion that a single order was "the most appropriate method" of effectuating the declared policy of the Act was reasonable in light of the record as a whole. The District Court further held that the Secretary's findings that the failure of the requisite percentage of handlers to sign the marketing agreement tended to prevent the effectuation of the declared policy of the Act and that issuance of the Order was the only practical means of advancing the interests of the producers in the area were supported by substantial evidence. (App. B at A21-A27.)

On Petitioners' second appeal, the Fifth Circuit held that the Secretary's determination that the milk Order in question tended to effectuate the policy of the Act was supported by substantial evidence and was not arbitrary, capricious or an abuse of discretion. (App. A at A9-A10.) The Court also ruled that the Secretary's determinations that the lack of handler approval tended to prevent the effectuation of the declared policy of the Act and that the issuance of the Order was the only practical means of advancing the interests of the producers were agency actions entrusted to the Secretary's unlimited discretion. Such determinations, the Court held, could not be reviewed on the grounds that they were unsupported by

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3. The Fifth Circuit also held that even if the bloc voting of Associated Milk Producers, Inc., may be held to have violated the terms of the Missouri District Court injunction this federal marketing order could not be invalidated on that ground. (App. C at A40-A42.)

substantial evidence or were arbitrary, capricious or an abuse of discretion, though such determinations could be reviewed for "procedural irregularity or fraud". (App. A at A10-A20.)

REASONS FOR GRANTING THE WRIT

Petitioners submit that in this case the United States Court of Appeals for the Fifth Circuit decided important issues of statutory construction not heretofore specifically determined by this Court. Petitioners further submit that the Fifth Circuit in its decision failed to adhere to the teachings of *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

The subject of the present case, the Agricultural Marketing Agreement Act of 1937, unquestionably is federal legislation which affects virtually all areas of the nation and vast segments of the population. In the realm of milk marketing alone the Act significantly impacts a myriad of handlers and producers, as well as millions of consumers of liquid milk and milk products. It is, therefore, patent that the proper determinations of the questions involved in this case are of substantial importance to the United States and in particular to its agricultural economy.

I.

The Determinations Of The Secretary Made To Overcome Lack Of Handler Approval Under 7 U.S.C. §608c (9) Were Not Made In Accordance With The Statutory Scheme And Requirements, And Judicial Review Of Such Determinations Is Not Limited To "Procedural Irregularity Or Fraud", Contrary To The Holding Of The Fifth Circuit.

The Fifth Circuit opened the portion of its opinion devoted to the determinations made by the Secretary to

overcome lack of handler approval with the observation that it involves "an issue of first-impression statutory interpretation." (App. A at A10, A11.) Petitioners agree that this is an accurate assessment of the dearth of court authority directly bearing thereon. However, Petitioners believe that the Fifth Circuit has misconstrued the Agricultural Marketing Agreement Act of 1937 and bestowed upon the Secretary plenary discretion not contemplated by the provisions of this legislation.

In Petitioners' view what the Fifth Circuit has done is to substantially eviscerate the requirements set forth in 7 U.S.C. §608c(9). Under Subsection 9 of §608c (App. I at A327-A329) a proposed order cannot become effective, upon the refusal or failure of the handlers accounting for more than 50 percent of the volume in the area to sign a marketing agreement, unless the Secretary determines that such failure or refusal tends to prevent the effectuation of the Act's declared policy and also that the issuance of such order is the only practical means of advancing the interests of the producers. Subsection 9, in addition, requires at least two-thirds producer approval, but the same amount of producer approval is required whether or not handler consent is obtained. Compare §608c(8)(A&B) with §608c(9)(B)(i&ii).

Subsection 3 of §608c (App. I at A313) directs that a hearing be held on a proposed order when the Secretary has reason to believe that the issuance of an order will tend to effectuate the declared policy of the Act. Subsection 4 of §608c (App. I at A313) refers to the making of certain findings by the Secretary upon evidence introduced at the hearing.

Largely on the basis of Subsections 3 and 4, the Fifth Circuit labeled the required hearing the "tendency" hear-

ing (App. A at A6, A7), but that is at least a partial misnomer. Consider the text of Subsection 4:

> "Finding and issuance of order (4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity."

Petitioners offer that the phrase "in addition to such other findings as may be specifically required by this section" refers to the Subsection 9 findings in question. Thus, while the hearing does pertain to the question of whether the proposed order will tend to effectuate the Act's declared policy, it also pertains to the Subsection 9 findings—tends to prevent the effectuation of the declared policy (A); and issuance is the "only practical means" (B).

However, Subsection 4 aside, there is no suggestion in Subsection 9 that the Secretary's determinations are not to be based on evidence taken at the prior hearing; and wording in Subsection 9 affirmatively links a previous hearing with the required determinations. (Also see Subsection 10, App. I at A329.) Regarding what the Court of Appeals chose to call the "tendency" hearing, the Secretary recited in the pertinent Decision on Proposed Amendments to Marketing Agreements and to Orders as follows:

> "A public hearing was held upon proposed amendments to the marketing agreements and the orders regulating the handling of milk in the aforesaid marketing areas." (App. E at A53).

This passage reflects that the lengthy hearing was not solely a "tendency" hearing, for matters involving both orders and marketing agreements were involved. (See also 7 U.S.C. §608b, App. I at A310.)

But even if it were assumed that the determinations in question are not to be based on evidence received at the original hearing or some subsequent hearing, still there is no indication whatever that these determinations were intended to be left to the unfettered discretion of the Secretary so that they would be immune from judicial review to at least ascertain if they were arbitrary, capricious or an abuse of discretion.

Below, the Secretary pressed upon the Fifth Circuit the following:

> "When Congress selected the language in the Agricultural Marketing Agreement Act of 1937, it was bound and determined to protect producers. Viewed in the context of this Congressional purpose, the Secretary's Section 8c(9) determinations are essentially ministerial and his determination under that Section that the order should become effective if producers approve is not subject to judicial review. Once the Secretary finds that the requisite number of handlers have failed to sign marketing agreements he then seeks to enter the order without their acquiescence since that is the 'only practical means' left open to him to advance the interests of the affected producers. The Secretary has interpreted his responsibilities under the statute in this manner since its enactment and has consistently followed this course of action. *See, e.g., Rock Royal, supra; H. P. Hood & Sons v. United States,* 307 U.S. 588, 591-93 (1939). (Footnote omitted.) This long-standing agency construction is entirely logical and is entitled to great deference. (Authorities omitted.)" (Secretary's Fifth Circuit Brief at 39, 40.)

Petitioners offer that when Subsections 3, 4, 8, 9 and 10 of §608c are examined and juxtaposed they do not reflect a statutory scheme which bestows upon the Secretary "administrative absolutism" regarding his Subsection 9 determinations. Rather, they reflect a Congressional call for multiple decisions after and flowing from a hearing or hearings, especially if the order is to be effectuated without handler approval. Furthermore, even if the Subsection 9 determinations were not intended to be based upon a hearing record, they were clearly intended by Congress as significant checks upon the exercise of the Secretary's power to promulgate a marketing order; and judicial review should be available on the question of whether the Secretary's decisions were arbitrary, capricious or an abuse of discretion, if not on the substantial evidence test. (5 U.S.C. §706(2), App. I at A338, A339.) The Fifth Circuit's decision, if allowed to stand, effectively pulls two of the "teeth" which Congress inserted into this Act.

The Court of Appeals recognized that this statutory scheme authorized a review of the Secretary's "tends to effectuate the declared policy" determination on a substantial evidence standard and/or an arbitrary and capricious standard. (App. A at A9, A10.) In attempting to differentiate this "tendency" determination from the "tends to prevent" determination of Subsection 9, the opinion reasoned that if the Secretary can determine that an order tends to effectuate the policy of the Act it follows that failure of handlers to approve such a marketing arrangement prevents the effectuation of the Act's policy. (App. A at A13.) Petitioners do not find that these two administrative decisions are, in effect, synonymous and, therefore, do not consider that Subsection 9(A) is merely a Congressional redundancy.

And what of the "only practical means" determination required in Subsection 9(B)? Obviously, to ascertain that a proposed order would tend to effectuate the declared policy is not the same as determining that its issuance is the only practical means of advancing the interests of the producers. More is needed to confirm that a course of action is the "only practical means" than to confirm that it is simply one reasonable means. The Fifth Circuit's opinion did not specifically address itself to the large question of why Congress would intend that the Secretary make his "tendency" decision based on a hearing record but that the more stringent "only practical means" determination be left to his unlimited discretion and not subject to review except for "procedural irregularity or fraud".

In taking the position that the Subsection 9 determinations "are essentially ministerial" and not subject to review, the Secretary maintained that he "has interpreted his responsibilities under the statute in this manner since its enactment and has consistently followed this course of action." (Secretary's Fifth Circuit Brief at 39, 40.) The Court below agreed that this is what has been happening since the Act was enacted. (App. A at A15.) The Court and the Secretary both pointed to *United States v. Rock Royal Co-Op*, 307 U.S. 533, 547 (1939), and to *H. P. Hood & Sons v. United States*, 307 U.S. 588, 592 (1939), as reflecting that the Act has been so administratively construed and administered. Petitioners find that the descriptions of the administrative practices contained in these decisions do not reveal that the Secretary was making these determinations on a "ministerial" or an "automatic" or a "wholly discretionary" basis.

If the Secretary's assertions to the Fifth Circuit are taken on their face, once the requisite amount of producer

approval is obtained, the Secretary can and does proceed to effectuate the proposed order without further reflection or discretionary encumbrance. Petitioners contend that such a practice by the Secretary constitutes a failure to follow the mandates of this statutory scheme. Hence, the Order in question was not made and issued in accordance with law and judicial review is not only appropriate but urgently required. This Court recognized in *Morris v. Gressette*, 432 U.S. 491, 501 (1977), that judicial review of a final agency action should not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. No such Congressional purpose is expressed, nor can it reasonably be implied, in regard to the determinations herein involved.

In considering the exclusions from judicial review specified in 5 U.S.C. §701(a) (App. I at A337), the Court below determined that there is no explicit preclusion of judicial review of the questioned decisions by the Secretary, but it indicated that they are "committed to agency discretion by law". While the opinion recited that in *Citizens to Preserve Overton Park v. Volpe, supra*, 401 U.S. 402 (1971), this Court cautioned that such exception to judicial review is "very narrow" and said that it is applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is "no law to apply", Petitioners feel that the Fifth Circuit either largely ignored or plainly misapplied the *Overton Park* rationale in arriving at its decision. In so doing, the Administrative Procedure Act's "generous review provisions" were not accorded the "hospitable interpretation" by the Fifth Circuit that was contemplated in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 141 (1967), although the Fifth Circuit also quoted briefly from that decision. (App. A at A12.) Petitioners assert that herein, even more than

in *Overton Park*, the Secretary (and the reviewing Courts) had law to apply. In this regard, 7 U.S.C. §602 (App. I at A308, A309) elaborates at some length concerning the policy and purposes of the Act.

Though the Fifth Circuit recognized that there was law to apply on the question of whether the proposed Order tended to effectuate the Act's policy, the Court concluded that no law existed in regard to the "only practical means" decision under Subsection 9(B). This result was achieved chiefly by the Court characterizing the hearing in question as the "tendency" hearing and deciding the Act does not permit or envisage any "additional" factual evidence or findings. (App. A at A14, A15.) As previously pointed out, such reasoning ignores the Congressional design that under Subsections 4 and 9 such determinations are to be made subsequent to the mandatory hearing; and there is no basis for concluding that this hearing was limited solely to the "tendency" issue.

In *Overton Park* the only hearing required under the statutes involved was to be conducted by local officials for the purposes of informing a community about a proposed highway project and eliciting community views on the design and route. It was not designed to produce a record that was to be the basis of agency action, and the substantial evidence test was held not to be an appropriate standard for review. 401 U.S. at 414, 415. In this respect Petitioners find that *Overton Park* is not analogous to the case at bar. At least one record hearing is expressly mandated by the statutory scheme under consideration herein. But in regard to the initial question of whether judicial review is not available because committed to agency discretion, Petitioners submit that the *Overton Park* decision is very relevant. *Id.* at 410-413.

Of course, the tenets and tests in the area of judicial review of administrative decisions are necessarily couched in somewhat broad terms; and the application of such guidelines to various federal acts, involving highly diverse statutory schemes, often presents difficulties. Nevertheless, Petitioners believe that the Fifth Circuit's analysis in this case does not apply the teachings of *Overton Park* with sufficient fidelity in ascertaining if and how these determinations should be judicially reviewed.

The Fifth Circuit's reliance on 7 U.S.C. §608c(15) is not well taken. (App. A at A16, A17.) Subsection 15 expressly authorizes a judicial examination as to whether the order was issued "in accordance with law". (App. I at A331, A332.) Patently, any and all of the complaints Petitioners are making in the present case are included within the ambit of the "in accordance with law" question. Yet even if this were not so, Petitioners would still be entitled to one or both of the types of review which they seek. Nor is the apparent reliance of the Court below on *Stark v. Wickard*, 321 U.S. 288 (1944), justified. As Petitioners read *Stark*, it supports their arguments and indicates that they are entitled to this judicial review, with or without Subsection 15.

Petitioners conclude that the Subsection 9 determinations by the Secretary are subject to judicial review on either the "substantial evidence" standard or the "arbitrary, capricious or abuse of discretion" standard, or on both standards. They believe that Congress intended that these decisions be made on the basis of the evidence taken at the original hearing, but if not made on that record, the Act requires, at least impliedly, that a further hearing be conducted, perhaps augmenting and supplementing the evidence received at the first. Petitioners further conclude that even if the substantial evidence standard is

found for some reason to be inappropriate then, at the very least, these Subsection 9 determinations should be reviewable under the arbitrary, capricious or abuse of discretion criterion.

In addition, the Secretary maintained in the Fifth Circuit that the Subsection 9 determinations had been made in a manner which Petitioners assert was not in compliance with the directives of the Act. Therefore, if Petitioners' reading of the statutory scheme is correct the Order palpably was not made in accordance with the law.

The Court of Appeals said that these decisions could be reviewed for "procedural irregularity or fraud". (App. A at A20.) Petitioners are not certain what the Court would include within the scope of such "procedural irregularity". (See also App. A at A17.) However, it is clear that the Court excluded both a "substantial evidence" and an "arbitrary and capricious" review therefrom.

The Fifth Circuit has misconstrued the statutory scheme in question and has failed to follow the mandates of *Overton Park* concerning the availability of judicial review. Certiorari should be granted to correct these errors involving an important federal Act.

II.

The Secretary Erred In Applying A "Domino Concept" In Merging The Corpus Christi Milk Order With The Other Five Orders, And The Fifth Circuit Assented To The Validity And Use Of That Erroneous Concept.

In forming the new, gigantic milk order in question, encompassing a large part of Texas, the Secretary applied a "domino concept" to justify the merging of the six existing orders. Petitioners contend that to properly include the Corpus Christi Order with the other orders, there must

have been evidence of a substantial interrelationship between the Corpus Christi Order and all of the other five orders.

Under this "domino concept", if there were, for example, an interrelationship between the Corpus Christi and the San Antonio Orders then these two orders should be merged; and if there were also an interrelationship between the San Antonio Order and the Austin-Waco Order, then those two orders should be merged along with the Corpus Christi Order, even though Corpus Christi was related to only one of the other two orders. This specious reasoning would "justify" not only the merger of the six separate Texas orders but the merger into one nation-wide order of all the federal milk marketing orders in the United States, for obviously no order is totally isolated and independent from each and every other market order in the country.

In the segment of the Fifth Circuit's opinion devoted to the review of the Secretary's determination that the merged orders would tend to effectuate the declared policy of the Act, the Court did not explicitly recognize that this question was involved and had been argued to it. Its review was couched in general terms, but the Court did quote a conclusion by the Secretary that "changes in marketing practice since that time (when the six orders were originally promulgated) . . . have caused these separately regulated areas to become substantially interrelated in both the distribution and procurement of milk." (App. A at A10.) This broad conclusion came at the outset of the Secretary's lengthy "Findings and Conclusions" (App. E at A59), but a bit later in the text the Secretary revealed the specific manner in which, at least regarding the Corpus Christi Order, he had reached that broader conclusion.

The Secretary wrote:

> "It is recognized that the Corpus Christi market has little intermarket relationship with some of the other markets to be merged. An extensive interfacing of one market with each of the other five markets is not necessary, however, to justify the six-market merger. For the reasons already described, separate orders for the several areas under consideration are no longer compatible with the current marketing practices in these regulated areas." (App. E at A68.)

In the Court of Appeals, the Secretary argued that this attack by Petitioners on his reasoning was lacking in merit. The Secretary asserted:

> "Therefore, the logic of appellants' argument leads to quite a different conclusion than they would reach. It would merely have required the Secretary first to have combined the other five orders and then to have merged Corpus Christi with the resulting order. This could occur if there were a substantial interrelationship among the five other orders, taken as a group, and Corpus Christi. It would not have required a showing that Corpus Christi was substantially interrelated with each of the other five markets. Collapsing the two steps into one logically is within the parameters of a 'reasoned order.' Accordingly, if there is substantial evidence to support the proposition that the Corpus Christi Order is substantially interrelated with the other five orders, taken as a group, the Secretary's decision should stand." (Secretary's Fifth Circuit Brief at 18, 19.)

Petitioners submit that this passage reflects the erroneous reasoning process which the Secretary has employed, and presumably will continue to employ, when he merges

orders. The Secretary's concept of a "reasoned order" is not reasonable and would permit him to combine a relatively diminutive order with a much larger order simply by finding an interrelationship between the area of the diminutive order and only a small segment of the area encompassed by the larger order. Thus, Petitioners conclude that this procedure, if approved, would enable the promulgation of a milk order covering virtually the entire nation.

Direct decisional authority on this question is sparse. In *United States v. Mills*, 315 F.2d 828 (4th Cir. 1963), *cert. denied*, 374 U.S. 832 (1963), the Court indicated that in determining the boundaries for a milk market order the Secretary must select a practical homogeneous territory of control. 315 F.2d at 835. The Fourth Circuit in *Mills* pointed to the seminal opinion of this Court concerning the Agricultural Marketing Agreement Act of 1937, *United States v. Rock Royal Co-Op*, *supra*, 307 U.S. 533 (1939), in which this Court wrote:

> "The Act authorizes a marketing agreement and order to be issued for such production or marketing regions or areas as are practicable. A city milkshed seems homogeneous. This standard of practicality is a limit on the power to issue orders. It determines when an order may be promulgated." *Id.* at 576.

It is clear, therefore, that the Secretary's authority in establishing the area of a milk order is limited under the Act, and Petitioners submit that when the Secretary has employed the described "domino concept", as he did in this instance, he exceeded such authority. The Court of Appeals assented to and approved such erroneous practice without specific discussion. This matter also involves an important question of federal law and statutory construction; hence, certiorari should be granted to consider and correct this error of the Secretary and the Courts below.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUNTEX DAIRY, et al.,
Plaintiffs-Appellants,

v.

John R. BLOCK, Secretary of Agriculture of the United States,
Defendant-Appellee.

No. 80-2101.
United States Court of Appeals,
Fifth Circuit.

Jan. 21, 1982.

Milk producers brought an action challenging an order of the Secretary of Agriculture which merged six milk marketing orders in Texas into single new order regulating the former six-market area and additional previously unregulated counties. The United States District Court for the Southern District of Texas, Robert O'Conor, Jr., J., upheld that order's validity, and milk producers appealed. The Court of Appeals, Tate, Circuit Judge, held that: (1) decision of Secretary of Agriculture that the challenged order tended to effectuate the policy of the Agricultural Marketing Agreement Act was supported by substantial evidence, and was not arbitrary, capricious, or an abuse of discretion, and (2) Secretary of Agriculture's determinations concerning effect of handler failure to approve milk marketing arrangement and necessity of challenged order were discretionary acts not subject to review by the courts except for procedural irregularity or fraud.

Affirmed.

1. Administrative Law and Procedure (Key) 763

"Arbitrary and capricious" standard is narrow and permits a reviewing court merely to consider whether agency decision was based on a consideration of irrelevant factors and whether there has been a clear error of judgment. 5 U.S.C.A. § 706(2)(A).

2. Administrative Law and Procedure (Key) 791

"Substantial evidence" standard requires a determination that agency findings are supported by such relevant evidence as reasonable mind might accept as adequate to support a conclusion. 5 U.S.C.A. § 706(2)(E).

3. Administrative Law and Procedure (Key) 789

If evidence of administrative record is such that it supports inconsistent inferences and conclusions courts must defer to administrative choice.

4. Food (Key) 4.5(5)

Decision of Secretary of Agriculture that the order merging six milk marketing orders in Texas into a single new order regulating the former six-market area and additional previously unregulated counties tended to effectuate policy of Agricultural Marketing Agreement Act was supported by substantial evidence, and was not arbitrary, capricious, or an abuse of discretion. Agricultural Adjustment Act, § 1 et seq. as amended 7 U.S.C.A. § 601 et seq.

5. Food (Key) 4.5(6)

Secretary of Agriculture's determinations concerning effect of handler failure to approve milk marketing arrangement and necessity of order, which merged six milk mar-

keting orders in Texas into a single new order regulating the former six-market area in additional previously unregulated counties, were discretionary acts not subject to review by the courts except for procedural irregularity or fraud. Agricultural Adjustment Act, § 8c(3, 4), (8)(A, B), (9)(A, B), (B)(i, ii) as amended 7 U.S.C.A. § 608c(3, 4), (8)(A, B), (9)(A, B), (B)(i, iii).

6. Administrative Law and Procedure (Key) 754

An agency action is committed to agency's discretion and is not reviewable when an evaluation of the legislative scheme as well as the practical and policy implications demonstrate that review should not be allowed. 5 U.S.C.A. § 701(a).

7. Administrative Law and Procedure (Key) 754

The "committed to agency discretion" exception of Administrative Procedure Act is very narrow; access to judicial review should be restricted only upon a showing of clear and convincing evidence of a contrary legislative intent to do so. 5 U.S.C.A. § 701(a).

8. Administrative Law and Procedure (Key) 754

In deciding whether an administrative determination is "committed to agency discretion" so as to except it from review, test is not whether a statute viewed in the abstract lacks law to be applied but, rather, whether in a given case there is no law to be applied. 5 U.S.C.A. § 701(a).

9. Administrative Law and Procedure (Key) 791

Review under substantial evidence test is authorized only when agency action is taken pursuant to a rule-making provision of Administrative Procedure Act or when

the agency action is based on a public adjudicatory hearing. 5 U.S.C.A. § 706(2)(E).

Atlas & Hall, Gary Gurwitz, Ballard Bennett, McAllen, Tex., for plaintiffs-appellants.

Raymond W. Fullerton, Terrence G. Jackson, U. S. Dept. of Agriculture, Washington, D. C., M. Angela Flores, Asst. U. S. Atty., Houston, Tex., John H. Sandor, Aaron Baer Kahn, Irene Marietta Solet, Dept. of Agriculture, Washington, D. C., for defendant-appellee.

Sydney Berde, St. Paul, Minn., for amicus Associated Milk Producers.

Appeal from the United States District Court for the Southern District of Texas.

Before TATE and WILLIAMS, Circuit Judges.*

TATE, Circuit Judge:

The plaintiff milk producers brought this action to challenge an order by the Secretary of Agriculture, which merged six milk marketing orders in Texas into a single new order regulating the former six-market area and additional previously unregulated counties. The district court held that substantial evidence supported the Secretary's determinations that (a) the merged order tends to effectuate the policy of the Act, (b) the failure of the milk handlers to approve the agreement tends to prevent the effectuation of the policy of the Act, and (c) issuance of the order is the only practical means of advancing the interests of the producers in the area. On appeal, the plaintiffs argue that all three determinations were

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*Due to his death on December 22, 1981, Judge Ainsworth did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. § 46(d).

unsupported by substantial evidence, and were arbitrary, capricious, and an abuse of the Secretary's discretion. We find that the Secretary's determination that the merged order tends to effectuate the policy of the Act was supported by substantial evidence, and was not arbitrary, capricious, or an abuse of discretion, and that his further determinations concerning the effect of handler failure to approve the marketing arrangement and the necessity of the order were discretionary acts not subject to review by the courts except for procedural irregularity or fraud. We therefore affirm.

The Merger of the Texas Milk Marketing Orders

The federal milk marketing regulation provisions embodied in the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 et seq. ("the Act") and various federal regulations present a highly complex scheme. Its purposes are to establish and maintain orderly marketing conditions for the covered commodities that will result in parity prices to farmers, to protect consumers in approaching the parity prices, to establish and maintain standards for commodities, to insure an orderly flow of the supply of commodites to market, and to avoid the disruption of orderly marketing through continued regulation.[1] Regulation is accomplished, in part, by the issuance of orders by the Secretary of Agriculture ("the Secretary") that establish a uniform minimum price to be paid to "producers" by "handlers," (*i. e.*, those dairy farmers who manufacture raw milk into bottled milk and other products).[2]

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1. 7 U.S.C. § 602.

2. The "labyrinth of federal milk marketing regulation provisions" is described in detail in *Zuber v. Allen*, 396 U.S. 168, 172-87, 90 S.Ct. 314, 317-25, 24 L.Ed.2d 345 (1969), and in our previous decision in this case, *Suntex Dairy v. Bergland*, 591 F.2d 1063 (5th Cir. 1979).

The Act provides that the Secretary shall issue a proposed order if, after notice and a hearing, he finds, and sets forth in the order, that the issuance of such order "will tend to effectuate the declared policy" of the Act.[3] An order may become effective if it is approved by a requisite proportion of the affected producers,[4] and if at least 50 percent of the affected handlers enter into a marketing agreement. If, however, the handlers fail or refuse to enter into a marketing agreement, the order may nevertheless become effective if the Secretary determines that lack of handler approval "tends to prevent the effecutation of the declared policy of the Act,"[5] that the order is "the only practical means of advancing the interests of the producers,"[6] and that the requisite number of affected producers approve the order.[7] Under the statutory scheme,

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3. 7 U.S.C. § 608c(3) provides that: "Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter . . . he shall give due notice of an opportunity for a hearing upon a proposed order."

7 U.S.C. § 608c(4) then provides that:

> After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

4. The Act provides (with certain modifications not relevant here) that at least two-thirds of the producers engaged in producing the commodity for market within the specified production area, two-thirds of the producers engaged in producing the commodity for sale within the specified marketing area, or the producers who have produced for market at least two-thirds of the volume of the commodity within either the specified production area or market area, may approve the order. 7 U.S.C. §§ 608c(8)(A) and (B).

5. 7 U.S.C. § 608c(9)(A).

6. 7 U.S.C. § 608c(9)(B).

7. 7 U.S.C. §§ 608c(9)(B)(i) & (ii). The requisite number of producers is the same as that described in note 4, *supra*.

a hearing is specifically required for the determination as to whether the issuance of the proposed order will tend to effectuate the purposes of the Act (the "tendency" hearing), 7 U.S.C. § 608c(3) and (4); however, the statute does not require an additional hearing for the Secretary's further determinations about refusal of handler approval and about the necessity of the order (the "necessity" determination), 7 U.S.C. § 608c(9)(A) and (B).

Prior to the issuance of the merged order challenged here, Texas was regulated by six separate milk marketing orders.[8] The plaintiffs are independent milk producers who were regulated under the former Corpus Christi Federal Milk Marketing Order. After a nine-day hearing, the Secretary promulgated a proposed order in which he found, on "the basis of evidence introduced at the hearing and the record thereof" that the issuance of an order that merged the six Texas orders, together with several previously unregulated areas, "will tend to effectuate, the declared policy of the Act."[9] A final order was then issued in which the Secretary determined that:

> (1) The refusal or failure of handlers . . . of more than 50 percent of the milk, which is marketed within the Texas marketing area, to sign a proposed marketing agreement, tends to prevent the effectuation of the declared policy of the Act;
>
> (2) The issuance of the Texas order, which amends and merges the aforesaid orders, is the only practical means pursuant to the declared policy of

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8. The six previously separate milk marketing orders were: South Texas, 7 C.F.R. § 1121 (1975); North Texas, 7 C.F.R. § 1126 (1975); San Antonio, 7 C.F.R. § 1127 (1975); Central West Texas, 7 C.F.R. § 1128 (1975); Austin—Waco, 7 C.F.R. § 1129 (1975); and Corpus Christi, 7 C.F.R. § 1130 (1975).

9. 40 Fed.Reg. 20,038 (1975).

the Act of advancing the interests of producers as defined in the Texas order;

(3) The issuance of the Texas order . . . is approved or favored by at least two-thirds of the producers who participated in a referendum and who during the determined representative period were engaged in the production of milk for sale in the Texas marketing area.[10]

The practical effect of this merged order is that the Corpus Christi producers will receive a lower minimum price for their milk than they received under the separate order that formerly regulated them.

The plaintiffs then brought an action in district court in which they alleged that the merged order was invalid because it was not supported by substantial evidence.[11] The district court held that the plaintiffs lacked standing to challenge the substantive merits of the milk marketing order. We reversed and remanded, *Suntex Dairy v. Bergland*, 591 F.2d 1063 (5th Cir. 1979). On remand, the district court found that all determinations by the Secretary were supported by substantial evidence, which ruling is the subject of the present appeal.

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10. 40 Fed.Reg. 23,438 (1975).

11. The plaintiffs also argued that a dairy cooperative, Associated Milk Producers, Inc., which has filed a brief as *amicus curiae* in the present case, violated a Missouri district court antitrust injunction by bloc voting during the referendum to get producer support for the order. In *Suntex*, we held that although the bloc voting may have violated the terms of the district court injunction, "[t]he appropriate response . . . is a matter for the Missouri district court under that court's continuing jurisdiction to enforce or protect its injunction order." 591 F.2d at 1068.

The Secretary's Determination that the Merged Order Tends to Effectuate the Policy of the Act

The plaintiffs contend first that the Secretary's determination that the merged order would tend to effectuate the purposes of the Act was unsupported by substantial evidence and was arbitrary, capricious, and an abuse of discretion.[12] We find this contention without merit.

[1-3] Our inquiry into the Secretary's decision that the merged order tends to effectuate the policy of the Act is limited, as in the case of judicial review of other agency decisions involving an adjudicatory hearing, to determining whether the agency's findings and conclusions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706 (2)(A), or "unsupported by substantial evidence," 5 U.S.C. § 706(2)(E). *See, e. g., Refrigerated Transport Co., Inc. v. I.C.C.*, 616 F.2d 748, 751 (5th Cir. 1980). The "arbitrary and capricious" standards is narrow and permits a reviewing court merely to consider whether the agency decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823-24, 28 L.Ed.2d 136 (1971). The "substantial evidence" standard requires a determination that agency findings are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938). If the evidence of record is such that

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12. These are two of the standards of review contained in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A and E). For a recent discussion of judicial review of agency action, see Pierce & Shapiro, Political and Judicial Review of Agency Action, 60 Tex.L.Rev.—(1981).

it supports inconsistent inferences and conclusions, the courts must defer to administrative choice. *Illinois Central Railroad Co. v. Norfolk & Western Railway Co.*, 385 U.S. 57, 69, 87 S.Ct. 255, 262, 17 L.Ed.2d 162 (1966). The Secretary's decision that the proposed order tended to effectuate the policy of the Act clearly survives judicial review under both the "arbitrary and capricious" standard and the "substantial evidence" standard.

[4] After notice and a hearing required under 7 U.S.C. § 608c(3) were provided, the Secretary found that although the six orders were distinguishable when originally promulgated, "changes in marketing practice since that time . . . have caused these separately regulated areas to become substantially interrelated in both the distribution and procurement of milk."[13] There was abundant evidence presented at the hearing from which the Secretary could conclude that the former six-market area was characterized by intermarket competition in distribution, common production areas, and common reserve supply.[14] In addition, the evidence also revealed that producers supplying the six-market area received different levels of payment for their milk.[15] The plaintiffs' contention that no significant interrelationship existed between it and the other merged markets was examined in depth by the Secretary, and was rejected.[16]

The Secretary's Determinations Concerning Handler Failure to Sign a Marketing Agreement, and the Necessity of the Order

[5] The plaintiffs' second argument is more difficult and presents this court with an issue of first-impression

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13. 40 Fed.Reg. 20,005 (1975).
14. *See id.* at 20,005-007.
15. *Id.* at 20,005.
16. *Id.* at 20,006-007.

statutory interpretation. After the Secretary had held the hearing pursuant to 7 U.S.C. § 608c(4), and the applicable rules of practice and procedure, 7 C.F.R. § 900 *et seq.* (1975), he subsequently issued a determination that "[t]he refusal or failure of the handlers . . . of more than 50 percent of the milk . . . marketed within the Texas marketing area, to sign a proposed marketing agreement, tends to prevent an effectuation of the declared policy of the Act" and that the issuance of the order was "the only practical means pursuant to the declared policy of the Act of advancing the interests of producers as defined in the Texas order." 40 Fed.Reg. 23,438 (1975). In addition, the Secretary found that the order was approved by the requisite number of producers, *see id.*, and accordingly, he issued the new order.

The plaintiffs argue that, even assuming that there was substantial evidence to support the Secretary's decision that the merged order tends to effecutate the declared policy of the Act, his further determinations that, in regard to the former Corpus Christi order, the absence of handler approval tended to prevent effectuation of the policy of the Act, and the only practical means of advancing the policy of the Act was to issue the producer-approved order, were unsupported by substantial evidence, as well as arbitrary, capricious, and an abuse of discretion.

We ultimately find, for reasons below set forth, that these determinations made by the Secretary were entrusted to his discretion and required no further factual showing beyond the findings in the initial "tendency" hearing that the order tended to effectuate the purposes of the Act.

[6] The Administrative Procedure Act, 5 U.S.C. § 702, provides that "A person suffering legal wrong because of agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Nevertheless, 5

U.S.C. § 701(a) states specifically that the provisions of the APA dealing with judicial review do not apply when: "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." Although there is no explicit preclusion of judicial review in the statute under discussion here, "an agency action is committed to the agency's discretion and is not reviewable when an evaluation of the legislative scheme as well as the practical and policy implications demonstrate that review should not be allowed." *Bullard v. Webster*, 623 F.2d 1042, 1046 (5th Cir. 1980), *cert. denied*, ... U.S. ...., 101 S.Ct. 1975, 68 L.Ed.2d 295 (1981), citing *Local 2855 v. United States*, 602 F.2d 574 (3d Cir. 1979).

[7] We are aware that the "committed to agency discretion" exception, 5 U.S.C. § 701(a), of the APA is "very narrow". *Citizens to Preserve Overton Park, supra*, 401 U.S. at 410, 91 S.Ct. at 820 (1971). Access to judicial review should be restricted "[o]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent" to do so. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967); *Citizens to Preserve Overton Park, supra*, 401 U.S. at 410, 91 S.Ct. at 820.[17] The courts have historically limited the exception to cases where: (1) the statute in question is "drawn in such broad terms that in a given case there is no law to apply, [and] courts . . . have no statutory question to review." S.Rep.No.752, 79th Cong., 1st Sess.,

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17. For a discussion of the "committed to agency discretion" exception to the general rule that agency decisions are amenable to judicial review, see Berger, *Administrative Arbitrariness: A Synthesis*, 78 Yale L.J. 965 (1969); Berger, *Administrative Arbitrariness: A Sequel*, 51 Minn.L.Rev. 601 (1967); Davis, *Administrative Arbitrariness is Not Always Reviewable*, 51 Minn.L.Rev. 643 (1967), Saferstein, *Nonreviewability: A functional Analysis of "Committed to Agency Discretion,"* 82 Harv. L.Rev. 367 (1968). *See also* L. Jaffe, Judicial Control of Administrative Action 353-76 (1965).

26 (1945) (on Administrative Procedure Act); *Citizens to Preserve Overton Park, supra*, 401 U.S. at 410, 91 S.Ct. at 821; *Santa Clara v. Andrus*, 572 F.2d 660, 666-67 (9th Cir.), *cert. denied*, 439 U.S. 859, 99 S.Ct. 176, 58 L.Ed.2d 167 (1978); (2) the courts are simply "ill-equipped" through a lack of expertise to review the decision in question, *Hahn v. Gottlieb*, 430 F.2d 1243, 1249 (1st Cir. 1970); *Kletschka v. Driver*, 411 F.2d 436, 443 (2d Cir. 1969); and (3) the agency action involves decisions relating to areas, such as national defense, that "lie outside sound judicial domain in terms of aptitude, facilities, and responsibility." *Curran v. Laird*, 420 F.2d 122, 129 (D.C.Cir. 1969).[18]

In "weighing of the need for, and the feasibility of, judicial review versus the potential for disruption of the administrative process," *Bullard, supra*, 623 F.2d at 1046, it is apparent to us that the determinations in question could not be subjected to any meaningful judicial review. After the Secretary holds the "tendency" hearing provided by 7 U.S.C. § 608c(4) and determines that the order tends to effectuate the policy of the Act, he must then determine whether, if the requisite number of handlers fail to approve the agreement, that failure tends to prevent the effectuation of the policy of the Act. Given that the Secretary has already made a determination, after notice and a hearing, that the order tends to effectuate the policy of the Act, it follows that failure by the handlers to approve such a marketing arrangement *prevents* effectuation of the policy of the Act. Judicial review of this determination could add nothing to the judicial review of the hearing provided by 7 U.S.C. § 608c(4), and such review would be duplicative and inefficient.

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18. *See generally* Pierce & Shapiro, *supra*, note 12.

Although analysis of plaintiffs' claim with respect to the Secretary's determination that issuance of the order is the only practical means of advancing the interests of the producers is more difficult, it nevertheless yields the conclusion that this determination is also not subject to our review.

[8] In deciding whether the Secretary's determination is "committed to agency discretion by law" the test "'is not whether a statute viewed in the abstract lacks law to be applied, but rather, whether '*in a given case*' there is no law to be applied.'" *Andrus, supra*, 572 F.2d at 666, quoting *Strickland v. Morton*, 519 F.2d 467, 470 (9th Cir. 1975) (emphasis in original).

The scope of discretion accorded to the Secretary under the statutory scheme is such that 7 U.S.C. § 608c(9)(B) imposes no "limits [on the] agency's discretion to act in the manner which is challenged." *Andrus, supra*, 572 F.2d at 666. The Secretary must make a factual determination after the hearing about the tendency of the order to serve the purposes of the Act. In that situation, the Secretary's discretion is limited by his lawful consideration of the evidence that is presented at the "tendency" hearing under 7 U.S.C. § 608c(4). Under 7 U.S.C. § 608c(9)(B), however, the Secretary is directed to determine, *without the development of an additional evidentiary record*, the necessity of the proposed order. The statute imposes rigorous obligations on the Secretary to develop an evidentiary record with respect to the "tendency" aspect of the order, but leaves him to make a determination of its "necessity" aspect without any further evidence to be taken. The most sensible construction of the statutory scheme, under these circumstances, is that the Secretary's determination for the "necessity" of the order—once the evidentiary "tendency" hearing establishes the Secretary's statutory au-

thorization to issue it—is left to his administrative decision whether or not to issue it as "the only practical means of advancing the interests of the producers . . . pursuant to the declared policy [of the Act]", 7 U.S.C. § 608c(9)(B). We are reinforced in our view that this is the proper interpretation of the statutory provisions, because the Act has been so administratively construed and administered (albeit without issue being raised, until now) since its enactment. *See, e. g., United States v. Rock Royal Co-Op., Inc.*, 307 U.S. 533, 547, 59 S.Ct. 993, 1001, 83 L.Ed. 1446 (1939); *H. P. Hood & Sons, Inc. v. United States*, 307 U.S. 588, 592, 59 S.Ct. 1019, 1022, 83 L.Ed. 1478 (1939).

Further, although the courts may be equipped to determine whether the Secretary's "tendency" determination is supported by substantial evidence, it is clear that we are ill-equipped to examine the Secretary's "necessity" determination in the absence of any *additional* factual evidence or findings, the making of which the Act does not envisage. If we were to hold that the Secretary's "necessity" determination were reviewable, it would imply that if the Secretary decided *not* to issue the order, then that decision would likewise be reviewable. That would put the federal courts in the position of possibly requiring that the Secretary issue an order that he has determined was not necessary to effectuate the purposes of the Act.

On oral argument the Court was informed that never in the history of the Act have the handlers voted to approve a marketing arrangement. Thus, the additional finding of necessity has always followed as a matter of course without further hearing or findings. It would alter the established practice of over forty years under the Federal Milk Marketing Act to discover now a separate judicial review of the "necessity" finding of the

Secretary. Thus, the logic of the finding of "necessity" being based upon the "tendency" hearing coalesces with the entrenched practice to establish that the "necessity" determination by the Secretary is discretionary administrative action.

Our conclusion of non-reviewability is supported by two additional considerations.

First, the statutory scheme of the Act and its limited judicial interpretations clearly define the ambit of federal court participation in the issuance of milk orders. 7 U.S.C. § 608c(15)(A) provides:

> Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. . . .
>
> After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, in accordance with law.

7 U.S.C. § 608c(15)(B) then provides for review in the district court of the ruling issued by the Secretary.

The judicial review provided by 7 U.S.C. § 608c (15)(A) has been interpreted in two primary cases. In *United States v. Rock Royal Co-Op., Inc.*, 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446 (1939), the Supreme Court accorded handlers standing to raise by way of defense issues of want of statutory authority to impose certain provisions that were alleged to discriminate against particular handlers. In *Stark v. Wickard*, 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733 (1944), producers were permitted to challenge the Secretary's deduction from a fund used to insure that

the minimum price established by an order accurately reflected the actual use to which handlers put their purchased milk. *Stark* was explicit in its holding that judicial review beyond that authorized by the statute is justified only when the issue is the Secretary's statutory authority for a particular action. *Id.* at 307, 64 S.Ct. at 570.

In the present case, however, the plaintiffs do not allege that the Secretary's determinations (that lack of handler approval tends to prevent effectuation of the Act, and that issuance of the order was necessary to advance the interests of the producers), are beyond the authority of the Secretary. Rather, the plaintiffs object to the *manner* in which the determinations were made. We have previously found no procedural irregularity in the manner in which the determinations were made, and our review function there ends so far as to the issues raised by this appeal.

We do not intimate that the producers have no ability to get substantive review of the merits of the Secretary's determination. The Act's provision for review was interpreted also in our earlier decision in *Suntex Dairy v. Bergland*, 591 F.2d 1063 (5th Cir. 1979), to accord standing to producers to request a substantive review of the merits of the Secretary's decision in his Section 8c(4) "tendency" determination. The plaintiffs may, of course, also challenge the "necessity" determination to the extent that "the agency lacked jurisdiction, that the agency's decision was occasioned by impermissible influence, such as fraud or bribery, or that the decision violates a constitutional, statutory or regulatory command." *Local 2855, supra*, 602 F.2d at 580.[19]

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19. The plaintiffs argue that *Suntex* requires judicial review of the Secretary's "necessity" determination, but such a reading would result in the producers having greater access to

(Continued on following page)

Second, even if we were to hold that the "necessity" determination was reviewable, it would have to be reviewed under the "arbitrary, capricious or abuse of discretion" standard of 5 U.S.C. § 706(2)(A). The inappropriateness of judicial review may be seen by examining to *what* we would apply this standard of review. In determining whether agency action is arbitrary and capricious, judicial review may focus only on the factors considered and the existence of an obvious error in judgment. The statutory scheme provides the Secretary with no further factors to consider after he has already conducted a full hearing and determined that the order tends to effectuate the policy of the Act. With respect to determining whether there has been an error in the Secretary's judgment to issue a particular order, we consider the Byzantine nature of milk marketing regulation and

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Footnote continued—

review than that explicitly provided by the Act. Rather, *Suntex* holds only that producers have standing to challenge the Secretary's order on its substantive merits; contrary to the plaintiffs' suggestion, *Suntex* did not provide a standard for the substantive review that the producers were given standing to request.

As described in Suntex I, the issue concerned whether the present milk producers had standing to attack the Secretary's statewide milk marketing order as "invalid because not supported by substantial evidence," 591 F.2d at 1064, (and also because of bloc voting by the Associated Dairy Cooperative—but this contention of the producers was rejected, see part III of opinion, *id.* at 1067-68, and *see* note 11, *supra*). The issue was whether the milk producers had "standing to seek judicial review on the *substantive* merits of the Secretary's determination that a new Texas-wide order should be promulgated." *Id.* at 1065 (emphasis supplied). In finding standing in the producers for judicial review of the "substantive legality of orders puromulgated pursuant to the [Act]," *Id.* at 1065-66, we relied upon such factors as that " 'where as here the issue is the statutory power to make the deductions required by Order . . ., a mere hearing or opportunity to vote cannot protect minority producers against unlawful exactions which might be voted upon them by minorities.' " *Id.* at 1066, see also 1067. The issue with which we are presently concerned (the Secretary's "necessity" determinations) was not before the appellate court or considered by it in *Suntex I*.

we "willingly confess our incapacity to contribute intelligently to the general course of decision" on federal milk marketing orders. *Hahn, supra*, 430 F.2d at 1249. On the basis of findings supported by substantial evidence that the order would tend to effectuate the purposes of the Act—and considering that the statutory scheme contemplates no further evidentiary hearing—we are unable to say that the judiciary could gainsay the Secretary's determination that the issuance of the order was the only practical means to effectuate the purposes of the Act when he finds that the requisite number of handlers have failed to enter into a voluntary agreement under 7 U.S.C. § 608c(8).

[8] The plaintiffs argue that the standard of review for the "necessity" determination should be "substantial evidence." However, "[r]eview under the substantial evidence test is authorized only when the agency action is taken pursuant to a rule-making provision of the [APA] . . . or when the agency action is based on a public adjudicatory hearing." *Citizens to Preserve Overton Park, supra*, 401 U.S. at 414, 91 S.Ct. at 822-23. The present Act is explicit in requiring notice and a hearing for the "tendency" determination under Sections 8c(3) and 8c(4), to effectuate the declared policy of the Act, but it does not require the Secretary to hold an additional hearing to make the further determinations that handler approval is absent, that lack of handler approval tends to prevent effectuation of the Act, and that issuance of the proposed order is the only way to effectuate the purposes of the Act.[20]

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20. The plaintiffs are vague in their argument about the standard of review that should be used, and one reading of their contention that the "substantial evidence" standard is proper is that the "necessity" determination should be made in the context of some type of hearing.

(Continued on following page)

Conclusion

We find that the Secretary's determination that the order tended to effectuate the policy of the Act was supported by substantial evidence and was not arbitrary, capricious, or an abuse of discretion. We also find that the Secretary's further determinations that lack of handler approval tended to prevent effectuation of the Act, and that issuance of the producer approved order was the only practical means of advancing the interests of the producers, where agency actions entrusted to his discretion and not reviewable by the courts except for procedural irregularity or fraud. Accordingly, we AFFIRM the decision of the trial court.

AFFIRMED.

Footnote continued—

The hearing that the plaintiff apparently desires must occur either in the context of the "tendency" hearing provided by 7 U.S.C. § 608c(4), to determine whether the proposed order will tend to effectuate the policy of the Act, or must be a separate subsequent hearing to determine whether the issuance of the order is necessary to effectuate the purposes of the Act.

With respect to a secondary hearing "within" the "tendency" hearing provided by 7 U.S.C. § 608c(4), the plain language of Section 8c(4) requires only that the Secretary determine that the issuance of the order will tend to effectuate the policy of the Act. It would be difficult, and at the very least extremely inefficient, to require that the Secretary made a determination about producer approval, lack of handler approval, and the *necessity* of the order in the context of the prior ("tendency") hearing designed to determine the tendency of the order to effectuate the policy of the Act.

If the plaintiffs intend by their argument to suggest that there should be a separate hearing subsequent to the "tendency" hearing, we reiterate that, although the Act is explicit in requiring notice and on hearing under section 7 U.S.C. § 608c(4), it is completely silent about the development of an evidentiary record in the context of the Secretary's determination concerning the necessity of the order.

APPENDIX B

(Filed August 4, 1980)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 75-B-102

SUNTEX DAIRY, ET AL.,
Plaintiffs,

vs.

ROBERT BERGLAND, Secretary of Agriculture of the United States,
Defendant

MEMORANDUM AND ORDER

The Plaintiffs herein are Texas independent milk producers challenging the Secretary of Agriculture's promulgation of a state-wide milk marketing order. This Court's decision that the producers had no standing to substantively attack the order was reversed by the United States Court of Appeals for the Fifth Circuit and remanded for a determination of the merits of the substantive claims. *Suntex Dairy v. Bergland*, 591 F.2d 1063 (5th Cir. 1979).

The Secretary of Agriculture's order, effective July 1, 1975, eliminated six regional milk marketing orders in Texas and instituted a single Texas marketing area encompassing the six areas previously regulated and some additional areas. The effect of the new order as regards these Plaintiffs is to lower the minimum price paid to milk producers in the former Corpus Christi marketing area. An explanation of this occurrence appears in the Fifth Cir-

cuit opinion in this cause of action, *Suntex Dairy v. Bergland, supra*, at 1064-65.

The cause is resubmitted to this Court on cross motions for summary judgment pursuant to Fed. R. Civ. P. 56. Its disposition depends upon the resolution of the issue of whether the Secretary's findings, insofar as they relate to that part of the order terminating the Corpus Christi marketing area (7 C.F.R. §§ 1130 *et seq.*), are supported by substantial evidence.

The Agricultural Marketing Agreement Act of 1937 ("the Act"), as amended, 7 U.S.C. §§ 601 *et seq.*, provides that the Secretary may issue an order if he finds upon the evidence submitted at the hearing required by Section 8c(3)[1] that issuance of the order "will tend to effectuate the declared policy"[2] of the Act. 7 U.S.C. § 608c(4). Before an order becomes effective, it must be approved by a specified percentage of producers, and the handlers accounting for 50 percent of the volume in the area must have signed a marketing agreement adopting the terms of the order. 7 U.S.C. § 608c(8). The failure or refusal of the requisite handlers to sign the marketing agreement can be overcome, however, if the Secretary determines that said failure or refusal "tends to prevent the effectuation of the declared policy" of the Act and that "issuance of the

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1. 7 U.S.C. § 608c(3) provides:

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this [Act] . . ., he shall give due notice of and an opportunity for a hearing upon a proposed order.

2. Section 2 declares that the policy of the Act is to establish and maintain orderly marketing conditions so as to provide parity prices to farmers and an orderly flow of commodities to market; to protect the interest of the consumer; to establish and maintain standards regarding commodities; and to continue for the remainder of the marketing period any regulation pursuant to an order so as to avoid a disruption of orderly marketing. 7 U.S.C. § 602.

order is the only practical means of advancing the interests of the producers." 7 U.S.C. § 608c(9).

The district court's function in reviewing milk marketing orders under 7 U.S.C. § 608c(15)(B)[3] is limited to a determination of whether the Secretary of Agriculture's findings are supported by substantial evidence. *Jones v. Bergland*, 456 F. Supp. 635, 646 (E.D. Pa. 1978). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Thus, the evidence "must be of such character as to afford a substantial basis of fact from which the fact in issue can be reasonably inferred." *Carlay Co. v. FTC*, 153 F.2d 493, 496 (7th Cir. 1946).

The reviewing court must consider the record as a whole, including the evidence detracting from the Secretary's view. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). The evidence is weighed,

> not to determine whether the evidence supporting the [agency's] finding is more convincing or of greater weight than evidence to the contrary, but for the purpose of comparing both and determining whether by comparison the evidence followed by the [agency] is substantial when compared with all the evidence in the record on the subject.

NLRB v. Falls City Creamery Co., 207 F.2d 820, 825 (8th Cir. 1953).

The role of the district court, therefore, is quite restricted: "[it] is not free to draw its own independent

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3. The District Courts of the United States are vested with jurisdiction to review the Secretary of Agriculture's rulings made in response to objections to the orders issued by him. 7 U.S.C. § 608c(15)(B).

inferences and conclusions from the record", *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 317 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969), nor may it "displace the [Secretary's] choice between two conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB, supra*, at 488. Review of agency action is similarly characterized in 4 Davis, *Administrative Law Treatise* § 29.05 (1958):

> The question for the reviewing court is thus whether the conclusions "reasonably may be based upon the facts proven." The court may not substitute its judgment on the question whether the inference drawn is the right one or whether a different inference would be better supported. The test is reasonableness, not rightness.

The primary issue before this Court is whether the Secretary's conclusion that the Corpus Christi market should be included in the Texas milk marketing area order is supported by substantial evidence in the record. The Plaintiffs assert that there can be no merger which includes the Corpus Christi order without a significant interrelationship between that market and the other Texas markets under consideration. They contend that the Defendant's decision is not based on substantial evidence in view of the fact that the Secretary recognizes that "the Corpus Christi market has little intermarket relationship with some of the other markets to be merged." 40 Fed. Reg. 20,004, 20,006 (1975).

The Defendant retorts that an "extensive interfacing of one market with each of the other five markets is not necessary . . . to justify the six-market merger" and that "separate orders for the several areas under consideration are no longer compatible with the current marketing

practices in these regulated areas." *Id.* at 20,006. The Secretary attributes the need for merger of the orders to changed marketing conditions in the six separately regulated orders. *Id.* at 20,004. He reasons that changes in marketing practices "have caused these separately-regulated areas to become substantially interrelated in both the distribution and procurement of milk." *Id.* at 20,005. Between September 1970 and September 1973 the monthly intermarket distribution among the six markets increased 54 percent. Marketing area boundaries do not delineate separate markets for the producers supplying handlers regulated by a particular order. *Id.* Furthermore, in June 1974 approximately 40 percent of the producers under the six orders delivered milk to more than one market. *Id.*

As regards the Corpus Christi market's interrelationship with the other related areas in the distribution and procurement of milk, the Secretary analyzed the evidence of inter-order handler competition and the overlapping of milksheds. He found that in September 1973 seven outside handlers were selling milk in the Corpus Christi market, three of which were from the North Texas order, and that in May 1973 Corpus Christi order producers in ten counties were shipping milk supplies to handlers in at least one of the other regulated markets. *Id.* Although the intermarket competition was less extensive for Corpus Christi handlers than for handlers in some of the other markets, the overlapping of the Corpus Christi milkshed with those of other markets was significant. *Id.* at 20,006.

The Defendant found that the Corpus Christi area is part of a large common market for producers and handlers. The majority of the producers supplying the six-market area are members of the regional cooperative association proposing the merger, the predominant cooperative

in the Corpus Christi market, so that most of the reserve milk supply is processed at the proponent cooperative's plants. *Id.* at 20,005. The handlers also depend on the proponent association to balance their milk supplies as the monthly supply from independent producers fluctuates. It is not unusual for handlers in the Corpus Christi order, a deficit market, to receive only enough milk from producers to fulfill their needs during the flush production months and then to supplement their supplies from the proponent cooperative during the other months.

> It is necessary under these circumstances for the cooperative to shift supplies among the various markets to meet the variable demands of Corpus Christi handlers. During some months of the year, it must draw on its reserve milk supplies associated with the North Texas and South Texas markets, while in other months it must transfer milk that is in excess of Corpus Christi handlers' needs to its manufacturing plants regulated under the North Texas and South Texas orders.

Id. at 20,007.

The Plaintiffs complain that the blend price that they receive under the new order will be less than what they received under the prior Corpus Christi order. The Defendant acknowledges that merger of orders normally results in some change in the level of blend prices, but the Secretary adds that "[t]he fact that returns to certain producers will be lowered cannot be an overriding consideration as to which orders, if any, should be merged." *Id.* at 20,006. In a federal milk marketing order case decided in the Fourth Circuit, the Court of Appeals found that some resultant damage to a handler or producer in the enforcement of the Act does not destroy the validity of an order. "Absolute equality is not demanded to sustain the operation of the Order. If the Secretary cannot 'produce complete

equality, for the variables are too numerous', he 'fulfills his role when he makes a reasoned' Order." (citation omitted). *United States v. Mills*, 315 F.2d 828, 838 (4th Cir.), *cert. denied*, 375 U.S. 819 (1963).

This Court is of the opinion that the evidence supporting the Secretary's decision to merge the six Texas orders is substantial. The situation existing in Texas was closely scrutinized by the Defendant[4] and the conclusion that a single order is the most appropriate method of effectuating the declared policy of the Act is reasonable in light of the record as a whole.

The Plaintiffs further allege that the Defendant failed to find that the failure of the requisite percentage of handlers to sign the marketing agreement prepared in connection with the order tends to prevent the effectuation of the declared policy of the Act and that issuance of the order is the only practical means of advancing the interests of the producers in the area; and, further, that if such finding was made by the defendant, it is not supported by substantial evidence.

The Secretary did enter the necessary finding, however, 40 Fed. Reg. 23437, 23438 (1975) (Administrative Record, Item 14k), and for the aforesaid reasons the Court determines that there is substantial evidence in support of said finding. Therefore, it is

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4. One Corpus Christi order handler expressed concern at the hearing that separate orders are necessary to reflect differing production conditions, such as availability and price of feeds, in the several marketing areas. The Defendant entered a supplemental finding that the minimum prices specified in the Texas order will reflect those factors and other economic conditions affecting market supply and demand for milk, will insure a sufficient quantity of wholesome milk, and will be in the public interest. 40 Fed. Reg. 20,004, 20,006, 20,038 (1975).

ORDERED, ADJUDGED and DECREED that the Defendant's Motion for Summary Judgment is hereby GRANTED and the Plaintiffs' Motion for Summary Judgment is hereby DENIED.

Signed this 4th day of August, 1980.

/s/ Robert O'Conor, Jr.
Robert O'Conor, Jr.
United States District Judge

APPENDIX C

SUNTEX DAIRY et al.,
Plaintiffs-Appellants,

v.

Robert BERGLAND, Secretary of
Agriculture of the United States,
Defendant-Appellee.

No. 77-1632.
United States Court of Appeals,
Fifth Circuit.

March 22, 1979.

Action was brought by independent milk producers alleging that Secretary of Agriculture's promulgation of a Texas-wide milk marketing order was invalid. The United States District Court for the Southern District of Texas at Brownsville, Robert O'Conor, Jr., J., held that milk producers did not have standing to bring substantive attack on milk marketing order, and that voting of large dairy cooperative did not violate Missouri district court injunction, and producers appealed. The Court of Appeals, Charles Clark, Circuit Judge, held that: (1) milk producers had standing to launch substantive attack on federal milk marketing order, and (2) even if dairy cooperative's bloc voting during referendum conducted to ratify marketing order violated terms of Missouri district court injunction, federal marketing order itself could not be invalidated on that ground.

Reversed and remanded.

1. Food (Key) 4.5(6)

Milk producers would have standing to contest substantive legality of orders promulgated pursuant to the

Agricultural Marketing Agreement Act if challenged action resulted in injury-in-fact to them, if interest invaded was arguably within zone of interest to be protected by statute, and if there was no statutory prohibition of judicial review. Agricultural Marketing Agreement Act of 1937, § 1 et seq., 7 U.S.C.A. § 601 et seq.

2. Food (Key) 4.5(6)

Independent milk producers, who alleged unlawful exactions by majority of producers in connection with newly promulgated Texas-wide milk marketing order that resulted in their receiving lower price for their milk, had standing to contest substantive legality of milk marketing order promulgated pursuant to the Agricultural Marketing Agreement Act, which does not specifically give producers right to seek judicial review, but which nowhere explicitly excludes producers from seeking such review. Agricultural Marketing Agreement Act of 1937, § 8c, 7 U.S.C.A. § 608c.

3. Food (Key) 4.5(1)

Although dairy cooperative's bloc voting may well have resulted in termination of existing federal marketing orders and thus have violated terms of Missouri district court injunction, federal marketing order itself could not be invalidated on that ground since bloc voting by cooperatives such as dairy cooperative in question was expressly authorized by statute. Agricultural Marketing Agreement Act of 1937, § 8c(12), 7 U.S.C.A. § 608c(12).

4. Injunction (Key) 211, 216

Injunction decree operates in personam, and act in violation of injunction is not a nullity.

5. Injunction (Key) 229

Appropriate response to any contempt on part of dairy cooperative in voting as a bloc during referendum conducted to ratify milk marketing order was matter for district court that issued injunction under its continuing jurisdiction to enforce or protect its injunctive order.

6. Food (Key) 4.5(1)

Federal milk marketing order could not be invalidated because some entity involved in promulgation process acted in contempt of court. Agricultural Marketing Agreement Act of 1937, § 8c, 7 U.S.C.A. § 608c.

Gary Gurwitz, Charles C. Murray, McAllen, Tex., for plaintiffs-appellants.

James R. Gough, U. S. Atty., Mary L. Sinderson, James S. Dougherty, Asst. U. S. Attys., Houston, Tex., John H. Sandor, Atty., U. S. Dept. of Agriculture, Washington, D. C., for defendant-appellee.

Appeal From the United States District Court for the Southern District of Texas.

Before JONES, CLARK and GEE, Circuit Judges.

CHARLES CLARK, Circuit Judge:

This appeal concerns whether producers of milk have standing under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, to seek judicial review of the imposition of a federal milk marketing order. The appellants are independent milk producers operating in the Rio Grande Valley and the area surrounding Corpus Christi, Texas. They allege that the Secretary of Agriculture's promulgation of a Texas-wide milk marketing order was invalid because not supported by substantial

evidence, and because a large dairy cooperative, Associated Milk Producers, Inc. ("AMPI"), allegedly violated a Missouri district court antitrust injunction by bloc voting its members during the referendum conducted to ratify the order.[1] The district court held that the milk producers did not have standing to bring a substantive attack on the milk marketing order, but that the producers did have standing to challenge the referendum procedures. The court ruled on the merits of that issue that the actions of AMPI were not violative of the Missouri district court injunction.

Holding that Milk producers do have standing to launch a substantive attack on a federal milk marketing order, we reverse the district court and remand for a determination of the merits of the producer's substantive claims. Although we believe that AMPI's conduct may well be held to have violated the Missouri district court injunction, we hold that the producers may not attack the federal milk marketing on that ground.

I.

Prior to 1975, the sale of milk in the area encompassing the Rio Grande Valley and Corpus Christi, Texas was regulated under the Corpus Christi Federal Milk Marketing Order. The Corpus Christi Order was one of six separate federal milk marketing orders regulating different geographic regions within Texas. On May 2, 1975, the Secretary of Agriculture promulgated an order eliminating the

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1. AMPI has been under an injunction from the United States District Court for the Western District of Missouri barring bloc voting in any referendum "if the effect of such vote will be to terminate any existing Federal Marketing Order." The appellants claim that the referendum conducted on the Texas-wide order did have the effect of terminating the Corpus Christi and other separate Texas orders, and that AMPI's bloc voting in the referendum thus violated the outstanding injunction.

six separate milk marketing orders in Texas and instituting a new Texas Marketing Area Milk Market Order, an order comprising all the area previously regulated by the six separate orders and some additional areas.

The effect of the new Texas-wide order was to lower the minimum price paid to milk producers in the former Corpus Christi Marketing Order area. Although a federal milk marketing order does not literally set the price for milk sales, it does set the minimum price which must be paid producers for their milk. Milk producers—dairy farmers—receive a "blend price" from the "handlers" who purchase and distribute their milk. The blend price is the uniform price paid to producers for all milk they sell to handlers no matter how it is eventually used. The blend price is arrived at by averaging under a weighted formula the prices of Class I milk—primarily fluid milk—and the prices of Class II milk—milk used for the production of cheese and other dairy products. Fluid milk brings higher prices than milk sold for cheese or other by-products but it must be sold soon after its production to avoid spoilage.

The blend price mechanism established by a milk marketing order acts as a stabilizing influence that insulates farmers from the buffeting of prices that would otherwise accompany differences in consumer demand. Handlers basically sell all that the market will absorb as Class I milk, with the surplus going to Class II usages. Any handler who receives more income from the sale of his purchased milk supply (after certain subtractions and additions) than he paid his producers under the blend price deposits the difference in a producer-settlement fund. This excess would reflect a strong consumer demand for fluid milk and thus relatively higher overall milk sale income. Any handler who receives less income than he

paid producers under the blend price may subtract the difference from the producer settlement fund. By incorporating the former Corpus Christi order into a larger Texas-wide order, the Secretary of Agriculture forced the Corpus Christi area producers to share in a much larger marketing pool than they had under the prior order. Because the Corpus Christi area Class I utilization was higher than the Texas-wide average Class I utilization, the effect was redistributive; the Corpus Christi area producers received a lower minimum price for their milk, while producers in other areas of Texas saw their income rise.

The process leading to the promulgation of a federal milk marketing order is set forth in section 8c of the Agricultural Marketing Agreement Act, 7 U.S.C. § 608c. The Secretary of Agriculture initiates the process of establishing a marketing order by proposing an order whenever he has "reason to believe" that an order is warranted. 7 U.S.C. § 608c(3). Following the proposal, there must be notice of an opportunity for a hearing. 7 U.S.C. § 608c(3). After conducting a hearing, the Secretary is to issue the order if "upon the evidence introduced at such hearing" the Secretary finds that issuance of the order "will tend to effectuate the declared policy" of the Act. 7 U.S.C. § 608c(4). After promulgation of the order under section 608c(4), an order still may not become effective until two-thirds of the producers in the market area or producers accounting for two-thirds of the total volume of milk produced in the area ratify the order by referendum. 7 U.S.C. § 608c(8). Section 608c(9) provides that handlers also have some ratification rights; no marketing agreement adopting the terms of an order can become effective if handlers accounting for 50 percent of the volume in an area fail to sign it. The 50 percent handler approval requirement can be overcome, however, if the

Secretary finds that the order tends to effectuate the Act's policy and "the issuance of [an] order is the only practical means of advancing the interests of the producers." 7 U.S.C. §608c(9)(B). Finally, section 608c(15) gives handlers the right to petition the Secretary any time any obligation imposed by the market order is deemed to be "not in accordance with law" and modification or exemption from the order is sought. 7 U.S.C. § 608c(15). Upon such petition the handler is entitled to a hearing, and the section specifically provides for judicial review of the Secretary's determination. Although handlers are the only group that the statute specifically mentions as having a right to seek judicial review, the statute nowhere explicitly excludes producers from seeking such review.

The district court ruled that milk producers did not have standing to seek judicial review on the substantive merits of the Secretary's determination that a new Texas-wide order should be promulgated. The court ruled that only handlers, and not producers, have standing under the statutory scheme to bring substantive challenges to market orders. It reasoned that since the statute specifically grants handlers the right of judicial review, the implication is that producers are excluded from seeking such review. The court further supported its position by arguing that in lieu of judicial review producers are protected by the provisions of the Act which grant them an opportunity for a hearing at the initial stages of the process, and by the requirement of two-thirds producer ratification before an order may become effective.

II.

[1] The milk producers have standing to contest the substantive legality of orders promulgated pursuant to the Agricultural Marketing Agreement Act of 1937 if

they can meet the three-part test established in *Barlow v. Collins*, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970) and *Association of Data Processing Serv. Organ., Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). That test is: (1) the challenged action must result in injury-in-fact to the plaintiffs; (2) the interest invaded must be arguably within the zone of interest to be protected by the statute; and (3) there must be no statutory prohibition of judicial review.

[2] All parties concede that the new Texas-wide marketing order results in injury-in-fact to the producers in the former Corpus Christi marketing order area by reducing the "blend price" they receive for milk. The crucial issues thus are whether the producer's interests are arguably within the zone of interest to be protected by the statute and whether the statute prohibits judicial review. Resolution of those two issues is controlled by *Stark v. Wickard*, 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733 (1944) and *Consolidated-Tomoka Land Company v. Butz*, 498 F.2d 1208 (5th Cir. 1974).

Stark was a suit brought by milk producers challenging certain deductions that were being made from the adjustment fund. The producers involved, like the plaintiffs here, were "not members of a cooperative association [and] as producers, many of them voted against the challenged amendment on the producer's referendum." 321 U.S. at 301, 64 S.Ct. at 567. The Supreme Court held that the producers had a legal right to receive payments in accordance with the Act and could judicially challenge the marketing order on the grounds that the order did not comply with the Act. *Id.* at 303-11, 64 S.Ct. at 568-571. As part of its discussion the Court noted that the only opportunity that the producers had to challenge the marketing order "was to appear at hearings and to vote for or against

the proposed order." *Id.* at 307, 64 S.Ct. at 569. "So long as the provisions are within the statutory authority of the Secretary," the court stated, "such hearings and ballotings furnish adequate opportunity for protest. . . . But where as here the issue is statutory power to make the deduction required by Order . . ., a mere hearing or opportunity to vote cannot protect minority producers against unlawful exactions which might be voted upon them by majorities." *Id.*, 64 S.Ct. at 569-70. (citations omitted) The court stated that "[t]here is no direct judicial review granted by this statute," *id.* at 307-08, 64 S.Ct. at 570, but it noted that "it is not to be lightly assumed that the silence of the statute bars from the courts an otherwise justiciable issue." *Id.* at 309, 64 S.Ct. at 570. The Court took notice of the fact that section 608c(15) specifically grants handlers a right to judicial review, but rather than infer any exclusionary intent as to producers from that provision, the Court treated it as evidence of congressional intent "to submit many questions arising under its administration to judicial review," *id.* at 308, 64 S.Ct. at 570, and it stated that it had previously "construed the Act to grant handlers judicial relief in addition to the statutory review specifically provided by § 8c(15)." *Id.* The Court held that the producers did have standing to bring their suit.[2]

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2. The arguments made by the Secretary against judicial review are the same arguments made in Justice Frankfurter's dissent in *Stark*. 321 U.S. at 311, 64 S.Ct. at 571 (Frankfurter, J., dissenting). The assertions that Congress intended to give producers the protections of a hearing and referendum in lieu of judicial review, and that an intent to exclude review for producers should be inferred from the express authorization for review given handlers, both originated in that dissenting opinion. *See* 321 U.S. at 315-20, 64 S.Ct. at 573-76. The fact that Justice Frankfurter's interpretation of the Act was forcefully presented to the Supreme Court and squarely rejected seriously undermines the Secretary's invocation of it here, even if *Stark* is technically distinguishable.

In *Tomoka*, producers sought review of a ratification referendum on the grounds that there were illegalities attendant to the election process. The court first rejected the assertion that producers had no interests arguably within the zone protected by the Act:

> As we view the Agricultural Marketing Act, Congress intended not to foreclose judicial review at the instance of producers such as the plaintiffs, but, on the contrary, intended, through the device of a validly conducted referendum, to give decisive weight to their views. The Act, 7 U.S.C. § 608(8), provides that no marketing order shall be effective unless the Secretary determines that the issuance of the order is approved either by two-thirds of the producers of the commodity proposed to be regulated by the order in the production area specified in the order, or by producers who have produced for market "at least two-thirds of the volume of such commodity produced for market within the production area." In light of this deference the statute itself pays to the interests of producers, it is clear that those interests are "arguably within the zone of interests to be protected or regulated by the statute . . . in question", and hence meet the test for standing to secure judicial review set forth in *Association of Data Processing Service Organizations, Inc. v. Camp.*

498 F.2d at 1209-10.

The *Tomoka* court then went on to reject the theory that the express grant of a right of judicial review for handlers evidenced an intent by Congress to exclude judicial review at the behest of producers, stating that: "Preclusion of judicial review must be founded on a ground more firm than *expressio unius exclusio alterius.*" *Id.* at 1210.

Although both *Stark* and *Tomoka* may be distinguished on their facts, their reasoning runs plainly and squarely against the Secretary. It is true that unlike the "arbitrary and capricious" claim made by the producers here, *Stark* involved a narrower claim to specific monies in the adjustment fund, and *Tomoka* concerned a procedural rather than substantive attack. But both *Stark* and *Tomoka* found that Congress did not intend to deny recourse to the courts by producers merely because it took the precaution of specifically authorizing judicial review for handlers. Having firmly established that principle, the force of *Stark* and *Tomoka* may not be avoided simply by distinguishing the nature of the complaint which producers have against a particular marketing order. In *Stark* the Supreme Court noted that the right to vote in a ratification referendum "cannot protect minority producers against unlawful exactions which might be voted upon them by majorities." 321 U.S. at 307, 64 S.Ct. at 569-70. No less than in *Stark*, the outnumbered independent milk producers here are alleging unlawful exactions by the majority; the precise nature of the alleged illegality does not alter the fact of practical economic loss, and cannot affect the producers' standing to bring their claim. Under *Stark* and *Tomoka*, the interests of producers are well within the zone protected by the Act, and Congress has not barred them from defending their interests in the federal courts.[3]

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3. The Secretary also cites the Ninth Circuit's holding in *Rasmussen v. Hardin*, 461 F.2d 595 (9th Cir.), *cert. denied*, 409 U.S. 933, 93 S.Ct. 229, 34 L.Ed.2d 188 (1972), to support his position that only handlers are entitled to judicial review under the statute. *Rasmussen* denied standing to a group of consumers seeking to challenge a federal milk marketing order. We find the generalized interests of consumers in a marketing order totally different from the interests of producers. The statute goes to great lengths to guard the interests of producers by providing for administrative hearings and a ratification referendum. No such Congressional deference was shown consumers. Producers

(Continued on following page)

The milk producers have standing to seek substantive review of the Secretary's finding that a Texas-wide order should be effectuated, and we remand to the district court for the purposes of conducting that substantive review.

III.

When the producer referendum on the Texas-wide order was conducted, the dairy cooperative AMPI voted its constituent members as a bloc in favor of the new order. AMPI had previously been a defendant in a large multidistrict antitrust suit that was consolidated for trial in the United States District Court for the Western District of Missouri. Allegedly predatory practices by AMPI in the South Texas area were among the issues presented in the Missouri litigation. The suit ended with a complex consent decree against AMPI. Paragraph VIII of the decree reads:

> The defendant is hereby enjoined and restrained for a period of five (5) years from the entry of this Final Judgment, from exercising its right to vote on behalf of its members pursuant to the terms of 7 U.S.C. §§ 608c(9)(1), 608c(12) and 608c(16)(b), if the effect of such vote will be to terminate any existing Federal Milk Marketing Order.

The appellants argue that the referendum in this case resulted in the termination of the Corpus Christi and other Texas marketing orders, and their replacement with a new order. Since the effect of the vote was termination

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Footnote continued—

also have a definite and direct economic stake in a milk market order, distinguishing them from consumers, who, as the *Rasmussen* court stated, "are affected by the order only if they choose to buy 'Go,' and then only if they must pay a higher price for it." 461 F.2d at 599. The holding in *Rasmussen* simply does not support the Secretary's position in this case.

of existing orders, the appellants reason that AMPI's bloc voting was illegal, and that the order should thus be set aside. The defendant-appellee's argument, accepted by the district court, is that the injunction refers only to situations where an area is totally deregulated, and not to situations where one marketing order is replaced by a larger one.

[3, 4] Although AMPI's bloc voting may well be held to have resulted in the termination of existing federal marketing orders and thus have violated the terms of the Missouri district court injunction, we hold that the federal marketing order itself may not be invalidated on that ground. Bloc voting by cooperatives such as AMPI is expressly authorized by the statute. 7 U.S.C. § 608c(12). The Missouri district court injunction cannot affect that statutory provision, it merely operates to enjoin certain conduct by AMPI. An injunction decree operates in personam, and an act done in violation of an injunction is not a nullity. *See Davis v. Prudential Insurance Company of America*, 331 F.2d 346, 350 (5th Cir. 1964);[4] 42 Am.Jur.2d Injunctions § 338.

[5] If AMPI's bloc voting is found by the Missouri court to be in violation of its injunction, it may be in contempt of that court. The appropriate response to such contempt, if it exists, is a matter for the Missouri district court under that court's continuing jurisdiction to enforce or protect its injunction order.

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4. *Davis* involved a husband's change of beneficiary on an insurance policy away from his ex-wife, in violation of a restraining order issued in a divorce proceeding. The court held that whatever remedies for violation of the injunction might exist in the nature of contempt proceedings or damage actions, violation of the injunction did not "void the transfer . . . in a suit by the protected party against the transferee." 331 F.2d at 350.

[6] Regardless of whether such litigation is pursued or of its outcome, a federal milk marketing order cannot be invalidated because some entity involved in the promulgation process acted in contempt of court. The redress for any violation of an antitrust injunction must be tailored to effectuate the purposes of the antitrust laws which the injunction served to enforce. It would not be proper to attempt to effectuate the purposes of an antitrust injunction by voiding, in a separate action, a part of the federal regulation of milk marketing merely because it happens to have involved the proscribed activity of the contemptor. A court reviewing a federal milk marketing order has no such power.

The judgment of the district court is reversed and remanded for proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

APPENDIX D

(Filed January 28, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION
CIVIL ACTION NO. 75-B-102

SUNTEX DAIRY, ET AL

VS

SECRETARY OF AGRICULTURE

ATLAS, HALL, SCHWARTZ, MILLS (GARY GURWITZ), MCALLEN, TEXAS, ATTORNEYS FOR PLAINTIFFS

EDWARD B. MCDONOUGH, UNITED STATES ATTORNEY, WILLIAM L. BOWERS, JR., HOUSTON, TEXAS, ATTORNEYS FOR DEFENDANT

MEMORANDUM AND ORDER

Plaintiffs are a group of 27 independent milk producers from the Corpus Christi area. Suit is brought pursuant to 28 U.S.C. 1331, 7 U.S.C. 608c and 5 U.S.C. 702/3/4 against the Secretary alleging that the plaintiffs have been harmed by final agency action, namely, a decision and order of the Department of Agriculture relating to "Milk in the North Texas and Certain Other Marketing Areas."

The effect of the order, effective July 1, 1975, is to abolish the former six regional areas or Orders of Texas regulated as to milk supply and minimum price, and to set up a single integrated area or Order encompassing the greater part of Texas, as plaintiffs contend, or its effect is to merge six former Orders in Texas, as the Secretary contends. The alleged harm to these plaintiffs

is that the minimum price that they will get for 'blended milk' under the new order will be less than what they have been receiving under the prior Corpus Christi Area Order (the meaning of 'blended price' is explained in the first brief filed by the Secretary).

The order and decision were based on the record made at an administrative hearing held in Dallas on December 3-7, 1973, and January 12-15, 1974, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.* and the applicable Rules of Practice, 7 CFR pt. 900 [the administrative record is on file with this Court]. The new Order is styled "Milk in the Texas Marketing Area," 7 CFR 1126.

Plaintiffs ask that either the milk marketing order that applied to the Corpus Christi area prior to July 1, 1975, be excluded from the merged or newly created Milk Marketing Order for lack of substantial evidence to support the Secretary's decision for its inclusion, or, alternatively, that a new referendum be held among the producers excluding bloc voting of the membership of Associated Milk Producers, Inc.

On June 13, 1975, this Court stayed the implementation of the new Order as it applied to the Corpus Christi area Order then in effect, and on June 30, 1975, by agreement of the parties that stay was lifted on condition that, if on final judgment the Texas Milk Marketing Order is held to be invalid and if the plaintiffs establish that they are entitled to damages because of such order, such damages would be paid out of the producers settlement fund of such order. (7 CFR 1126.70)

The cause is submitted to this Court on cross-motions for summary judgment pursuant to F.R.C.P. Rule 56. Its disposition depends upon the resolution of four questions:

1. Have plaintiffs standing to seek judicial review of the Secretary's decision under the terms of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.* or under the rulings of the courts with regard to standing to seek judicial review of administrative action under the Act?

2. Was the referendum of the producers under 7 U.S.C. 608c(9) properly held and the result valid and effective?

3. Did the Secretary make the required determination under 7 U.S.C. 608c(9) following the failure or refusal of the handlers to sign a marketing agreement?

4. Is there substantial evidence to support the decision of the Secretary of Agriculture to merge the six milk marketing orders or to create a new milk marketing order out of six former orders (the alternative wording 'merge' and 'create' being an issue in the second question above)?

1. *Do plaintiffs have standing to seek judicial review of the final agency action involved here - the milk marketing order?*

The Agricultural Marketing Agreement Act of 1937 provides expressly for judicial review of any administrative order thereunder for handlers affected by administrative action. 7 U.S.C. 608c(15). The question here is whether that provision precludes judicial review at the behest of an aggrieved producer either challenging the procedure by which a milk marketing order was promulgated, or challenging the marketing order itself. With regard to the former - challenging the procedure - the Fifth Circuit has held that producers do have standing. *Consolidated-Tomoka Land Co. v. Butz*, 498 F.2d 1208 (5th

Cir. 1975). Accordingly plaintiffs here do have standing to raise questions 2 and 3 infra.

With regard to the latter - challenging the Order itself - the situation is more problematic. In *Consolidated*, supra, the Court did not have to meet the question of whether plaintiff producers have standing to challenge the order itself, and an inference that they do have cannot be made from that decision. Standing given to producers in prior cases by the higher courts is limited. Producers have been held to have standing to question the disbursement of producer settlement funds under a milk marketing order on the rationale that they have a property interest in that fund and the manner of its disbursement, cognizable in court. *Stark v. Wickard*, 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733 (1944). Also producers successfully sought to have a location differential under a milk marketing order invalidated, although in that case the question of standing was not raised, but the basis of the holding in their favor might also be said to provide a basis for standing, namely, that the Secretary had acted outside the scope of his statutory authority. *Zuber v. Allen*, 396 U.S. 168, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969).

As Justice Frankfurter points out in his dissent in *Stark*, supra, the Act gives standing to handlers because they are the persons who are directly regulated by and obligated under the milk marketing order, and unlike the producers, the order can be brought into effect without their majority agreement. The producers are not regulated under the Act - 7 U.S.C. 608c(13)(B) states that "no order issued under this chapter shall be applicable to any producer in his capacity as a producer." - but the Order does affect the minimum price that they will receive for that milk which they do sell to regulated handlers. The essential purpose of the marketing act was to raise the

producers' prices and, of course, plaintiff producers are contending that the effect of replacing or supplanting the former Corpus Christi milk marketing order is to reduce the minimum price (blended price, actually) that they had been getting under that order.

In *Dairylea Co-Operative Inc. v. Butz*, 504 F.2d 80 (2d 1974) the Second Circuit stated that a producer did have standing to question an order, without much discussion except to note that the Act was silent as to both judicial and administrative remedies for producers, and concluded that this silence did not bar producers from judicial remedies, citing *Stark*, supra, and *Zuber*, supra. It is, however, by no means clear that the decisions in *Stark* and *Zuber*, each of which involved judicial review of a specific aspect of an existing order, can be construed to mean that producers have standing to seek judicial review under the substantial evidence rule of an entire milk marketing order itself, otherwise brought into effect by procedurally proper means.

In discussing the issues of standing and reviewability of final agency action in *Hayes International v. McLucas*, 509 F.2d 247 (5th Cir. 1975), the Fifth Circuit states the three requirements for standing to seek review as follows:

1. plaintiff must allege that the challenged action has caused him injury in fact, economic or otherwise, *Association of Data Processing Service Organization v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970).

2. the interest sought to be protected by plaintiff must arguably be within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question, *Camp, supra*, and

3. there must be no 'clear and convincing' indication of a legislative intent to withhold judicial review. *Camp, supra,* and *Abbot Laboratories v. Gardner,* 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed. 2d 681 (1967).

Cf. *Rasmussen v. Hardin,* 461 F.2d 595, 598 (9th Cir. 1972). Plaintiffs meet the first requirement. As for the second, while plaintiffs' interest in the 'blended price' received under an order comes arguably within the zone of interests to be protected by the statute, it is more doubtful that their interest in the 'blended price' under the prior Corpus Christi order in the light of the new Order, questioned here, come arguably within the zone of interests to be protected by the statute. In this case resolution of that requirement is inextricably intertwined with the third requirement-reviewability - since it is unclear from the statute that they have any sort of protectible interest in the milk marketing order itself, as distinct from the minimum (blended) prices they will receive under any particular order if they sell to regulated handlers. On the third requirement it is first noted that the Supreme Court has held that there is virtually a presumption in favor of judicial review, *Gardner,* supra, unless a contrary purpose is fairly discernible in the statutory scheme, *Camp,* supra, and as stated in *Barlow v. Collins,* 397 U.S. 159, 166, 90 S.Ct. 832, 838 25 L.Ed.2d 192 (1970) "clear command of the statute will preclude review, and such a command of the statute may be inferred from its purpose". It is this Court's opinion that the statutory scheme, by its provisions for notice and hearing before the promulgation of an order, by its provisions for the required vote of two-thirds of the producers, and by its provision for administrative and judicial review for handlers and its silence on all others, reveals a clear and convincing legislative intent that the order of the Secretary is not made reviewable at the behest of the pro-

ducers. 5 U.S.C. 701(a)(1) Cf. dissent of Justice Frankfurter in *Stark*, supra, and *Rasmussen v. Hardin*, 461 F.2d 595, 598-600 (9th Cir. 1972).

Accordingly plaintiffs do not have standing to raise question 4, infra.

2. *Was the Referendum Pursuant to 7 U.S.C. 608c(9) validly held?*

Plaintiffs contend that due to an injunction issued out of the United States District Court for the Western District of Missouri (Western Division) on April 30, 1975, Associated Milk Producers, Inc., was not permitted to bloc vote its membership in favor of the amendment and merger which resulted in the milk marketing order in question here (*United States v. Associated Milk Producers, Inc.*, 74-CV80-W-1). Under the Agricultural Marketing Agreement Act of 1937, it is ordinarily permitted under 7 U.S.C. 608c(12) to co-operative associations such as A.M.P.I. to bloc vote its membership in any vote or referendum held pursuant to 7 U.S.C. 608c(8)(A) or (B), 608c(9)(B) and 608c(19).

The pertinent part of the final judgment in 74-CV80-W-1 (W.D. Miss.) which plaintiffs say supports their contention is Paragraph VIII:

> The defendant [AMPI] is hereby enjoined and restrained for a period of five (5) years from entry of this final judgment, from exercising its right to vote on behalf of its members pursuant to the terms of 7 U.S.C. 608c(9)(B), 608c(12) and 608c(16)(B), if the effect of such vote will be to terminate any existing Federal Milk Marketing Order (file document 21, Exh. A, p. 12)

Plaintiffs contend that the vote here resulted in the termination of the Corpus Christi Milk Marketing Order, among others, and its replacement by another Order, so that by the terms of the above-cited paragraph VIII of the final judgment of the Missouri Court, A.M.P.I. was not authorized to bloc vote its membership since the effect of such vote was to terminate an existing milk marketing order.

The Secretary of Agriculture, on the other hand, contends that the Texas Milk Marketing Order resulted from an amendment to a prior milk marketing order (initially styled "Milk in the North Texas and Certain Other Marketing Areas"), and a merger of six prior milk marketing orders in the Texas area. In his brief the Secretary states that prior to the time A.M.P.I. bloc voted here, he sought an opinion from the Department of Justice-antitrust division- as to the effect of Paragraph VIII of the final judgment on bloc voting in the matter at issue here and the Secretary states as follows:

> It was concluded that such paragraph prohibited bloc voting only where a vote against a given marketing order would terminate said Order and was not applicable to any votes in favor of a given order or an amendment to such order which would include mergers inasmuch as a merger is essentially an amendment of previous orders into a larger order usually regulating the same parties or perhaps additional parties. (file document 21, p. 3)

CF file document 21, Exh. C & D.

It is the Court's opinion that Paragraph VIII, supra, is directed at bloc voting wherein the vote results in the termination of an existing milk marketing order, that is wherein an area is taken out of the scope of regulation

under 7 U.S.C. 601 *et seq.*, rather than directed at bloc voting which results in an amendment to an existing order or a merger of existing orders, in which the area remains regulated under the Act.

Accordingly the Court finds that the referendum of producers was properly held.

3. *Did the Secretary Make the Required Finding Under 7 U.S.C. 608c(9)?*

It is provided in the Act [at 7 U.S.C. 608c(9)] that where the handlers of more than 50% of the volume of milk covered by the order have refused or failed to sign a marketing agreement pursuant to 7 U.S.C. 608b prepared in conjunction with the order, the order will become effective only when the Secretary determines that such failure or refusal tends to prevent the effectuation of the declared policy of the Act with regard to milk and its products *and* that the issuance of such order is the only practical means of advancing the interests of the producers of milk (along with the requisite vote by the producers). Plaintiffs make a twofold contention here. First they say that the Secretary did not make that determination. However, the administrative record reveals that such determination was made (Record, Exh. 14j, p. 2). Secondly, they argue that, even if that determination was made, it is not supported by substantial evidence, is arbitrary and capricious and an abuse of discretion. If the Secretary's findings and the order based on same are supported by substantial evidence (the opposite contention of plaintiffs being dealt with in 4 infra.) then by the same token those findings and the order based on them would be sufficient to support the Secretary's determination as made in Exhibit 14j of the administrative record.

4. *Is the Secretary of Agriculture's decision supported by substantial Evidence?*

In view of the Court's holding in (1), supra, that the statute precludes judicial review at the behest of plaintiff producers of the final agency action involved here, this question is not required to be answered for disposition of the case.

Accordingly, the Court finds that the Motion for Summary Judgment of the Defendant Secretary of Agriculture should be granted and that this cause should be dismissed with costs to be assessed against plaintiffs. An appropriate order will be issued with this Memorandum.

The clerk will forward copies of this Memorandum to the attorneys for the parties.

Signed at Laredo, Texas, this 28th day of January, 1977.

/s/ Robert O'Conor, Jr.
Robert O'Conor, Jr.
United States District Judge

APPENDIX E

DEPARTMENT OF AGRICULTURE
Agricultural Marketing Service

[7 CFR Parts 1121, 1126, 1127, 1128, 1129, 1130]

[Dockets Nos. AO-231-A41, etc.]

MILK IN THE NORTH TEXAS AND CERTAIN OTHER MARKETING AREAS

DECISION ON PROPOSED AMENDMENTS TO MARKETING AGREEMENTS AND TO ORDERS

7 CFR part	Marketing Area	Docket No.
1121	South Texas	AO-364-A8.
1126	North Texas	AO-231-A41.
1127	San Antonio, Texas	AO-232-A27.
1128	Central West Texas	AO-238-A30.
1129	Austin-Waco, Texas	AO-256-A23.
1130	Corpus-Christi, Texas	AO-259-A27.

A public hearing was held upon proposed amendments to the marketing agreements and the orders regulating the handling of milk in the aforesaid marketing areas. The hearing was held, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), and the applicable rules of practice (7 CFR Part 900), at Dallas, Texas, on December 3-7, 1973, and January 22-25, 1974, pursuant to notice thereof issued on November 9, 1973 (38 FR 31432).

Certain issues pertaining to the South Texas order (issues 5 and 6 as listed below) were dealt with in a de-

cision issued on April 24, 1974 (39 FR 14950). Amendments resulting therefrom were issued on May 22, 1974 (39 FR 18448), and became effective August 1, 1974.

Upon the basis of the evidence introduced at the hearing and the record thereof, the Acting Administrator on November 27, 1974 (39 FR 43000; F.R. Doc. 74-28295), filed with the Hearing Clerk, United States Department of Agriculture, his recommended decision on the remaining issues and notice of the opportunity to file written exceptions thereto.

The material issues, findings and conclusions, rulings, and general findings of the November 27, 1974, recommended decision are hereby approved and adopted and are set forth in full herein, subject to the following modifications:

1. Under the heading "2. *Need for merger of orders.*":

a. Paragraph 3 is changed.

b. Two new paragraphs are added after paragraph 18.

c. Ten new paragraphs are added after paragraph 23.

2. Under the heading "4. (a) *Milk to be priced and pooled.*", the following changes are made:

a. Under the subheading "*Pool plant.*":

(1) Paragraphs 5, 22, 47, 54, and 72 are changed.

(2) Two new paragraphs are added after paragraph 4.

(3) A new paragraph is added after paragraph 20.

(4) Three new paragraphs are added after paragraph 46.

(5) Six new paragraphs are added after paragraph 72.

b. Under the subheading *"Handler."*, paragraphs 7, 11, 13 and 15 are changed.

c. Under the subheading *"Producer-handler."*, paragraph 2 is changed.

d. Under the subheading *"Producer."*, 3 new paragraphs are added at the end of the discussion.

e. Under the subheading *"Producer milk."*, paragraphs 2, 4, and 17 are changed, paragraph 3 is deleted, and a new paragraph is added after paragraph 7.

f. Under the subheading *"Definition of a receipt."*, a new paragraph is added at the end of the discussion.

3. Under the heading "(c) *Class I price and in-area location adjustments.*";

a. Paragraphs 5, 6, and 7 are changed.

b. A new paragraph is added after paragraph 5.

c. Paragraphs 11-14 are deleted and 4 new paragraphs are substituted therefor.

d. Paragraph 18 is deleted.

e. Six new paragraphs are added after paragraph 19.

f. Paragraphs 29-31 are deleted and 7 new paragraphs are substituted therefor.

g. Four new paragraphs are added after paragraph 36.

h. Under the subheading *"Out-of-area location adjustments."*:

(1) Paragraphs 1, 2, 8, 9, 11, 16, and 19 are changed.

(2) Paragraph 10 is deleted and 4 new paragraphs are substituted therefor.

(3) Two new paragraphs are added after paragraph 19.

(4) A new paragraph is added at the end of the discussion.

4. Under the heading "(d) *Distribution of proceeds to producers.*", the following changes are made:

a. Under the subheading "*Payments to producers.*":

(1) Paragraphs 8, 12, 17 and 19 are changed.

(2) A new paragraph is added after paragraph 15.

(3) Eight new paragraphs are added after paragraph 16.

(4) Paragraph 20 is deleted and 4 new paragraphs are substituted therefor.

(5) Three new paragraphs are added after paragraph 22.

(6) A new paragraph is added at the end of the discussion.

b. Under the subheading "*Advertising and promotion program.*", a new paragraph is added after paragraph 5.

5. Under the heading "(e) *Administrative provisions.*", a new paragraph is added at the end of the discussion on "*Termination of order.*":

The material issues on the record of the hearing relate to:

1. Whether the handling of milk produced for sale in the proposed merged and expanded marketing area is in the current of interstate commerce, or directly burdens,

obstructs, or affects interstate commerce in milk or its products;

2. Whether the marketing areas of the present North Texas, South Texas, San Antonio, Central West Texas, Austin-Waco and Corpus Christi orders should be included under one order;

3. Whether the proposed merged marketing area should be expanded to include additional territory in the States of Texas and Arkansas;

4. If a single order is issued for the proposed merged and expanded marketing area, what its provisions should be with respect to:

(a) Milk to be priced and pooled;

(b) Classification of milk;

(c) Class prices, butterfat differentials, and location adjustments;

(d) Distribution of proceeds to producers; and

(e) Administrative provisions;

5. Need for amending the classification and pricing provisions of the South Texas order prior to any merger of orders; and

6. Whether an emergency exists to warrant the omission of a recommended decision with respect to Issue 5.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

1. *Character of commerce.* The handling of milk in the proposed "Texas marketing area" is in the current of

interstate commerce and directly burdens, obstructs or affects interstate commerce in milk and milk products.

A number of Texas handlers distributing milk in the proposed marketing area receive bulk milk from sources in Kansas, Oklahoma, and Arkansas. Also, milk is distributed regularly in the proposed area by a handler located in Oklahoma.

Plants located in the marketing area at Sulphur Springs and Muenster, Texas, in addition to manufacturing locally-produced milk not needed for fluid use, also process milk produced in Oklahoma, New Mexico, Arkansas and Kansas. Milk is shipped from these plants, as well as from farms in the proposed marketing area, to plants in Oklahoma, Arkansas, Tennessee and Missouri.

In addition to the interstate movements of bulk milk, manufactured dairy products from other states, such as cheddar cheese from Wisconsin and cottage cheese from Missouri, are marketed in the proposed Texas marketing area. Also, it is customary for condensed products and nonfat dry milk that are made at the Sulphur Springs and Muenster plants to be sold to customers in Oklahoma, Arkansas, New Mexico and other states.

2. *Need for merger of orders.* Marketing conditions in the six separately regulated marketing areas under consideration justify the issuance of a single order regulating the handling of milk in these areas. This single order is the most appropriate means of effectuating the declared policy of the Act.

The merger of the North Texas, South Texas, San Antonio, Central West Texas, Austin-Waco and Corpus Christi orders was proposed by Associated Milk Producers, Inc. This producer cooperative association represents a

major proportion of the producers supplying milk to handlers regulated by these six orders.

Only limited opposition to the proposed merger was expressed at the hearing by producers or handlers. Although they did not testify at the hearing, members of a relatively small cooperative association in the Corpus Christi market indicated in their brief that they opposed the inclusion of their market in any merger. A similar position was taken at the hearing by a handler regulated under the Corpus Christi order, who also expressed general opposition to a merger of any of the orders under consideration. Both the co-operative and the handler also expressed opposition to the proposed merger in their exceptions to the recommended decision.

When the six orders were promulgated, they regulated the handling of milk in areas that were generally distinguishable as separate markets for particular groups of producers. Changes in marketing practices since that time, however, have caused these separately regulated areas to become substantially interrelated in both the distribution and procurement of milk. It is reasonable to expect that the interrelationship of these present order areas will become even more pronounced over time.

From a distribution standpoint, the separate marketing areas were based on boundaries at which intermarket competition in the sale of fluid milk products was at a minimum among handlers that would be regulated under the individual orders. Since the respective orders were promulgated, the number of regulated handlers has declined significantly. For example, over 40 distributing plants were initially regulated by the North Texas order. Currently, there are 16 such regulated plants in that market, and at least four of these were not among the 40 or so initial plants. Handlers

continuing in business in the several markets have increased the output of their distributing plants and have expanded their sales territory. As a result, significant intermarket competition has developed among handlers operating under the six orders.

Presently, fluid milk sales are being made in the South Texas market by 11 handlers from among the other five markets. Similarly, four such "outside" handlers have fluid sales in the North Texas market, eight have sales in the Central West Texas area, five distribute in the San Antonio area, seven sell milk in the Corpus Christi market, and 14 have fluid sales in the Austin-Waco market.

Much of the intermarket distribution is from plants regulated under the North Texas order. Of these, 10 distribute fluid milk products in the Austin-Waco market, three have sales in the Corpus Christi market, five distribute milk in the San Antonio market, 11 sell milk in the South Texas market and seven distribute in the Central West Texas market.

Between September 1970 and September 1973, the monthly intermarket distribution among the six markets increased 54 percent (from 17.3 to 26.6 million pounds). The September 1973 intermarket sales represented about 13 percent of all producer receipts used in the six markets that month in Class I.

The marketing area boundaries defined by the six orders thus no longer delineate the areas within which competition in the sale of fluid milk products is substantially only among handlers regulated by an individual order. In this circumstance, separate markets for the producers supplying these handlers no longer exist.

The six markets are also characterized by a substantial overlapping of milksheds. In May 1973, for example,

56 Texas counties were each a source of milk for handlers regulated under two or more of the orders. Twelve of these counties were each a source of milk for three of the regulated areas, and four others were a procurement area for four or more of the order areas under consideration.

All of the six markets are significantly involved in this overlapping of supply areas. In May 1973, competition for milk supplies with at least one of the other regulated areas existed in 36 counties for the North Texas area, in 11 counties for the Central West Texas area, in 11 counties for the Austin-Waco area, in 15 counties for the San Antonio area, in 10 counties for the Corpus Christi area, and in 52 counties for the South Texas area.

The local nature of the six markets has greatly diminished also in terms of producer marketing organizations. When the individual orders were promulgated, many of the producers in the market were members of a cooperative association that confined its marketing activities to the local marketing area. Each producer group not only marketed the bulk of the milk associated with its market but also operated a "balancing" plant, usually with manufacturing facilities, for clearing the market of milk not needed by local handlers.

The majority of the producers now supplying each of the separately regulated areas are no longer associated with local market organizations but are members of the "regional" cooperative association proposing the six-market merger. This multi-market producer group is the only cooperative operating in the Central West Texas, Austin-Waco and San Antonio markets, where it furnishes virtually the total market supply, and is the predominant cooperative in the North Texas, South Texas and Corpus Christi markets.

Following the merging of the local market cooperatives into a large regional organization, steps were taken by the proponent cooperative to consolidate all of its manufacturing operations associated with the six markets into three plants. Manufacturing facilities previously operated by local cooperatives at Rusk, Ballinger, Round Rock, La Grange and San Antonio, Texas, are now closed. The only remaining cooperative association plants in these markets with manufacturing facilities are proponent's plants at Muenster and Sulphur Springs, Texas, and Hillsboro, Kansas. Although proprietary nonpool plants are in operation at Sulphur Springs, Schulenburg and Navasota, Texas, these plants have relatively limited manufacturing capacity and in total represent a minor part of the necessary capacity to handle the reserve supplies of the several markets. Thus, most of the available reserve milk supply for the six-market area is processed at the proponent cooperative's plants.

Because of the cooperative's varied arrangements for supplying handlers and disposing of surplus milk, many members of this regional cooperative have no regular association with a specific market. Within a single month, milk of individual members may be moved as producer milk to two or three plants, all regulated under different orders. In June 1974, for example, about 40 percent of the producers under the six individual orders delivered milk to more than one market.[1]

Returns from all member milk sold in all six markets are collected by the cooperative and reblended to its members. The price each member receives for his milk may or may not be closely related to the order uniform price

1. Official notice is taken of the July 1974 issue of "Milk Market Report" published by the market administrator for the six Texas orders involved in this proceeding.

announced for the market or markets to which his milk was delivered.

The proponent cooperative's Muenster and Hillsboro plants referred to earlier are presently regulated under the North Texas order. Its Sulphur Springs plant is a South Texas pool plant. In handling the reserve supplies of the various markets, the cooperative has elected in many cases to pool the milk that is received at these plants for manufacturing as producer milk under the order regulating the plant rather than as a diversion of milk from the other order plant where the producer's milk is usually received. This arrangement results in the reserve milk supplies for the six individual markets being pooled on either the North Texas or South Texas market depending on the manufacturing plant involved. Since in this case producers on the other four markets are not bearing their proportionate share of the lower-valued reserve milk that necessarily must be associated with the Class I outlets in those markets, serious inequities result between the cooperative's members and other producers on the several markets.

When the cooperative elects to pool the milk received at its balancing plant under the order regulating the plant rather than under the order from which the milk could have been diverted, the prices received by the cooperative's member producers in the market with the balancing plant are not affected. This is because the regional association reblends the proceeds from the sale of its milk under the six orders. Producers in this market who are not members of the cooperative association, however, receive a lower uniform price because of the manner in which the cooperative pools the milk received at the balancing plant. Such a pricing situation results in disorderly marketing conditions and considerable unrest among producers who are receiving the lower prices.

In its exceptions to the recommended decision, this cooperative indicated that the above description of its operations was misleading in two respects. The cooperative claimed that there is the implication that it is free to elect "at all times" whether to pool milk under the order regulating the balancing plant or to treat the milk as a diversion from another order. It contended that its options in this regard actually are limited by the constraints of various regulatory requirements.

In response, we would merely point out that the above findings do not suggest that the cooperative is in a position to make such an election "at all times." The varying provisions of the individual orders, the different sizes of the markets and practical methods of operation all combine to place some constraints on the cooperative's pooling of milk in certain markets at certain times.

The cooperative also claimed in its exceptions that the Acting Administrator failed to recognize that when milk is pooled under the order regulating the balancing plant nonmembers in the other market from which the milk is shifted receive a higher uniform price. This presumably is true, but the point has significance only if there is more than a token number of nonmembers in the other market.

In view of these circumstances, separate orders for the several areas under consideration are no longer compatible with the current marketing practices in these regulated areas. The adoption of a single regulation for an area that has become a common market will insure more orderly marketing and promote a more equitable sharing of the proceeds from the sale of their milk among all producers supplying the market.

The proposed merger of the six orders was opposed at the hearing by a handler regulated under the Corpus

Christi order. The handler indicated that separate orders are necessary to reflect differing production conditions, such as availability and price of feeds, in the several marketing areas. The handler also stated that if the six orders are merged market data for the individual production areas no longer would be available and that producers, consumers and handlers benefit from such data.

A merger of the six orders will not result in a disregard for the production conditions in the supply areas of the merged market. Such conditions necessarily must be taken into consideration in establishing an appropriate Class I price level under a merged order. An inadequate recognition of the existing production conditions could result over time in either excessive or insufficent milk supplies for consumers in the market.

It is possible under a merger that some market data for individual production or sales areas within a large market might not be as readily available. It cannot be concluded, however, that parties in the Corpus Christi area will be seriously handicapped in their respective activities because of this.

As already described, the Corpus Christi area, along with the other regulated areas under consideration, is very much a part of a large common market for producers and handlers. The opposing Corpus Christi handler himself is in competition with at least two handlers regulated under the San Antonio order. The handler also depends upon the proponent cooperative association to regularly balance his milk supplies as his supply from independent producers fluctuates from month to month. As indicated, the cooperative's balancing operations for one market generally affect the returns of producers in other markets.

A number of parties filed exceptions to the recommendation that the several orders in southern Texas be

merged with other Texas orders. Such parties included the handler just referred to, a handler and two producers located in the San Antonio area, and a cooperative association and nine producers supplying milk to the Corpus Christi market. A basic contention of most of these parties was that the six-market merger would result in a lower blend price to those producers whose milk is now pooled under the southern Texas orders. It was claimed that this could jeopardize the milk supply for southern Texas and result in handlers in that area having to rely on milk supplies from the northern part of the State.

Any merger of orders normally can be expected to result in some change in the usual level of blend prices received by various groups of producers. As is the case here, this is because of differences in the Class I utilizations of the markets involved. As described earlier, the reasons for these different utilizations are in part the basis for the merger. The reserve milk supplies being carried in certain markets have resulted in relatively higher blend prices to producers in the other markets. The fact that returns to certain producers will be lowered cannot be an overriding consideration as to which orders, if any, should be merged.

Only time will tell whether the merger will result in a different level of production and allocation of supplies within the various parts of the Texas market. Should experience show that handlers are having difficulty in procuring adequate milk supplies, this problem may be reviewed at a later hearing. It should be noted, however, that inadequate milk production in a local area does not necessarily mean that the Class I price for that area should be increased. If milk can be procured from distant areas at that price, a price increase for the local area would not be in the public interest. From the standpoint

of the most efficient allocation of agricultural resources, the Class I price for an area, such as the present Corpus Christi market, should be no higher than is necessary to attract an adequate supply of milk, either from local producers or distant sources.

The handler and certain producers in the Corpus Christi market contended in their exceptions that there is not a significant interrelationship between that market and the other Texas markets to be merged. The handler claimed that a merger of the Corpus Christi market with others cannot be justified unless this market is closely related to each of the other markets involved.

In the case of overlapping distribution areas of handlers, the intermarket competition is less extensive for Corpus Christi handlers than for handlers in some of the other markets under consideration. Nevertheless, in September 1973, seven out-of-area handlers were selling fluid milk in the Corpus Christi market. They were competing in that area with five Corpus Christi order handlers. The record does not indicate the proportion of the fluid sales in the market by the out-of-area handlers.

With respect to milk procurement, data indicate that in May 1973 Corpus Christi handlers received producer milk from 16 counties in which there were 3 or more Corpus Christi producers. From only six of these counties was the total milk production in the county shipped to the Corpus Christi market. In the case of the other 10 counties, milk was shipped from each county not only to Corpus Christi handlers but to one or more of the other regulated markets as well. The 105 Corpus Christi producers in those 10 counties at that time represented one-half of the producers on the market in May 1973. This does not support the contention that the Corpus Christi milkshed does not overlap to a significant degree with

the milksheds of other markets. Also, there is little basis under this circumstance for the contention that production costs of Corpus Christi producers are significantly different from those of other order producers.

It is recognized that the Corpus Christi market has little intermarket relationship with some of the other markets to be merged. An extensive interfacing of one market with each of the other five markets is not necessary, however, to justify the six-market merger. For the reasons already described, separate orders for the several areas under consideration are no longer compatible with the current marketing practices in these regulated areas.

In the exceptions, it was claimed that the balancing function that the merger proponent is performing for the Texas market is one that the cooperative created and assumed and that the related financial burden to its members should not be shared with nonmembers through the merger of orders. The evolvement of proponent's market balancing activities on a regional basis has already been described. It should be recognized at this point that the proponent cooperative is the major supplier of milk in the Texas market and that this in itself tends to impose upon it the major balancing function of the market.

Many handlers in Texas, especially in the southern portion of the State, receive only enough milk at their distributing plants to meet their fluid requirements. These requirements change from day to day and season to season. Handlers arrange for the major cooperative to supply them with milk at the time and in the quantities needed. Some handlers purchase their full supply from the cooperative while others receive some milk directly from producers and supplemental supplies from the cooperative. In both situations, the cooperative assumes the responsibility of disposing of any milk a handler does not need. Frequently,

one handler may not need milk on a particular day while some other handler may need an additional quantity. In this situation, the cooperative will take the milk that regularly goes to the first handler's plant and deliver it to the second handler's plant. This is an efficient way of handling the milk and maximizes the Class I utilization of producer milk on the market. If no one needs the milk that is excess to a handler's needs, the cooperative must dispose of the milk through its manufacturing plants.

The record indicates that it is not unusual for Corpus Christi handlers to receive only enough milk directly from producers to fulfill their fluid requirements during the flush production months and then supplement these supplies with purchases from the proponent cooperative during the other months of the year. It is necessary under these circumstances for the cooperative to shift supplies among the various markets to meet the variable demands of Corpus Christi handlers. During some months of the year, it must draw on its reserve milk supplies associated with the North Texas and South Texas markets, while in other months it must transfer milk that is in excess of Corpus Christi handlers' needs to its manufacturing plants regulated under the North Texas and South Texas orders.

The handler excepting to the merger of the Corpus Christi order pointed out that the Corpus Christi market is a deficit market and that nonmember producers are reluctant to increase their production because they do not have adequate local facilities available to handle their surplus milk. Thus, exceptor recognized the necessary balancing function performed by proponent cooperative in making additional milk supplies available when needed and handling the excess supplies of milk associated with the Corpus Christi market.

The cooperative proposing the merger urged that the merged order continue the provisions of the North Texas order except for certain modifications. The order adopted herein generally carries out this concept. The North Texas order provisions have been appropriate for achieving the ends sought by the regulatory plan for the North Texas area. Many of these provisions are essentially the same as corresponding provisions in the other five orders included in the merger. On the basis of the hearing evidence, it is found that the North Texas provisions, with certain modifications, will be appropriate for achieving orderly marketing conditions in the proposed Texas marketing area. Only the significant modifications will be dealt with in this decision.

The order adopted herein continues the use of the part number for the present North Texas order, Part 1126. The amended Part 1126, upon issuance, would supersede Parts 1121, 1127, 1128, 1129 and 1130.

Although the present six orders would no longer exist upon effectuation of the Texas order, this merger action is not intended to preclude the completion of those procedures that would otherwise have existed under the separate orders with respect to milk handled prior to the effective date of the merger. Such procedures, which would need to be carried out after the merger date, include the announcement of certain class prices and butterfat differentials, submission of reports, computation of uniform prices, payment of obligations, and verification activities. The provisions of the merged order would apply only to that milk handled after the effective date of the merger.

3. *Expansion of the merged marketing area.* All territory now within the defined marketing areas of the Austin-Waco, Central West Texas, Corpus Christi, North

Texas, San Antonio and South Texas orders should be included in the marketing area of the merged order. The Texas marketing area also should include all of the territory within the 22 counties that contain the cities, towns and Air Force base that now comprise the Central West Texas marketing area. It also should include 35 additional Texas counties that presently are not part of any Federal order marketing area. All territory occupied by government (municipal, State, or Federal) reservations, installations, institutions or other establishments, if any part thereof is within any of the designated counties, as well as all piers, docks, and wharves, including craft moored thereat, that are a part of these counties, likewise should be a part of the Texas marketing area.

The adopted marketing area consists of 155 Texas counties with a total population of just under 9.5 million (based on the 1970 census). This marketing area represents a contiguous geographical area in which handlers who would be regulated by the merged order have most of their fluid milk sales. No new plants would be brought under regulation through the area expansion proposed herein.

The present Central West Texas order designates 32 cities and towns and the Abilene Air Force Base as the defined marketing area for that order. These populated areas are located within the following 22 counties throughout the central and western portions of Texas:

Brown.
Coleman.
Comanche.
Dawson.
Eastland.
Ector.
Fisher.
Haskell.
Howard.
Jones.
Knox.
Midland.
Mitchell.
Nolan.

Palo Pinto.
Runnels.
Scurry.
Shackelford.
Stephens.
Stonewall.
Taylor.
Tom Green.

As advocated by the merger proponent, the merged marketing area should include all territory in these 22 counties rather than just certain cities and towns. In all but four counties, about 25 percent or more of the population resides outside the regulated area in each county. It is customary for handlers to distribute milk to available outlets throughout these counties rather than just in the regulated areas. Defining the marketing area in what is now the Central West Texas market on the basis of county boundaries will have no different regulatory effect on handlers.

The 35 additional unregulated Texas counties that should be added to the combined marketing area are:

Andrews.
Aransas.
Bee.
Borden.
Burleson.
Calhoun.
Callahan.
Coke.
De Witt.
Fayette.
Foard.
Glasscock.
Goliad.
Gonzales.
Hamilton.
Jack.
Karnes.
Kenedy.
Kent.
King.
Lavaca.
Lee.
Leon.
Martin.
Milam.
Mills.
Refugio.
Robertson.
Sterling.
Throckmorton.
Victoria.
Willacy.
Wilson.
Wise.
Young.

Inclusion of these counties in the marketing area was proposed by the merger proponent. The cooperative's witness indicated that such counties are a part of the sales area of handlers now regulated by the six orders and thus should be within the defined marketing area.

Of the 35 counties, 19 (Aransas, Bee, Burleson, Calhoun, De Witt, Fayette, Goliad, Gonzales, Karnes, Kenedy, Lavaca, Lee, Leon, Milam, Refugio, Robertson, Victoria, Willacy and Wilson) are virtually surrounded by one or more of the marketing areas for the Austin-Waco, Corpus Christi, North Texas, San Antonio and South Texas orders. Several handlers indicated that they had sales in one or more of these unregulated counties and that all of their competitors in these counties are regulated under one of the six orders proposed for merger. Although two distributing plants are located in these unregulated areas (at Gonzales and Victoria), both are regulated under the South Texas order. With a merger of the six orders, all sales in the 19 counties would be by handlers regulated under the same order.

It is reasonable in this circumstance to "block-in" the marketing area by including these 19 counties. Providing for a contiguous marketing area in which handlers that would be regulated by the order have most or all of the fluid sales will remove the necessity of handlers maintaining separate records of out-of-area sales in these counties. Such records are necessary to determine if a plant has met the minimum in-area route disposition requirement of the order.

For similar reasons, the remaining 16 of the 35 counties described earlier likewise should be a part of the Texas marketing area. Of the 16 counties, all but Wise County border on those counties in which the regulated cities and

towns comprising the Central West Texas marketing area are located. Wise County borders on the North Texas marketing area. Ten of these counties (Andrews, Martin, Borden, Kent, King, Foard, Throckmorton, Young, Jack and Wise) form a long, narrow geographical area that separates the Lubbock-Plainview and Red River Valley marketing areas from the Central West Texas area. Glasscock, Sterling, Coke and Callahan Counties are generally surrounded by regulated areas in the Central West Texas market. Hamilton and Mills Counties are nearly encompassed by the Central West Texas, North Texas and Austin-Waco marketing areas.

Handlers who would be regulated by the merged order are the principal distributors of milk in these 16 counties. Although some sales in the counties bordering on the Red River Valley and Lubbock-Plainview marketing areas emanate from these neighboring regulated markets, there is no indication that the inclusion of such counties in the Texas marketing area would alter the pooling status of the other order plants making such sales. As indicated earlier, the inclusion in the marketing area of those counties that are a definite part of the sales area of regulated handlers will obviate the need for such handlers under the merged order to maintain out-of-area sales records.

In addition to the areas discussed above that should be a part of the marketing area, the merger proponent also requested the inclusion of an additional 48 Texas counties and the City of Texarkana, Arkansas. The 48 counties are:

Atascosa.	Kerr.
Bandera.	Kimble.
Blanco.	Kinney.
Bowie.	La Salle.
Brewster.	Llano.
Cass.	Loving.
Concho.	Mason.
Crane.	Maverick.
Crockett.	McCulloch.
Culberson.	McMullen.
Dimmit.	Medina.
Edwards.	Menard.
Frio.	Pecos.
Gillespie.	Presidio.
Irion.	Reagan.
Jeff Davis.	Real.
Jim Hogg.	Reeves.
Kendall.	San Saba.
Schleicher.	Val Verde.
Starr.	Ward.
Sutton.	Webb.
Terrell.	Winkler.
Upton.	Zapata.
Uvalde.	Zavala.

This portion of the cooperative's marketing area proposal is denied.

Of these 48 counties, all but Bowie and Cass Counties are located in the southwestern portion of Texas. The 46 counties cover a vast expanse of land that is sparsely populated. The total population in 1970 was 420,000, with Laredo (69,000), in Webb County, being the only city of any appreciable size.

There is little indication from the record of the extent of distribution in the 46-county area by handlers who

would be regulated under the merged order. Although a number of the counties border on the southern and western fringes of the Central West Texas, Austin-Waco, San Antonio and Corpus Christi marketing areas, most of the 46-county area in southwestern Texas is a substantial distance from the distribution centers of the markets proposed for merger. One can surmise that handlers in the regulated markets extend their sales into the nearby unregulated counties. The record is completely lacking, however, as to the sales patterns in both the neighboring counties and the more distant unregulated areas. Moreover, it is probable that a major part of the fluid sales in the westernmost counties of Texas is by handlers regulated under the Rio Grande Valley order. There apparently are no unregulated sales in these counties.

There is no indication that failure to include the 46 counties in the merged marketing area will result in disorderly marketing conditions for regulated handlers or the producers supplying them with milk. Any affirmative action concerning these counties should be based on a more conclusive record.

Bowie and Cass Counties are located in the northeasternmost part of Texas. The City of Texarkana is partly in Bowie County and partly in the State of Arkansas.

The inclusion of these unregulated areas in the marketing area as urged by the proponent cooperative, would result in the full regulation of two distributing plants at Texarkana, Texas. Such plants are now partially regulated distributing plants under the North Texas order by virtue of their limited fluid sales in the North Texas marketing area. One plant is also a partially regulated distributing plant under the Central Arkansas order.

Proponent claimed that full regulation of these plants is necessary to assure competitive equity between presently regulated handlers and the Texarkana plants with respect to fluid sales in overlapping sales areas. It was contended that the Texarkana plants are buying milk not on a classified use basis but rather at a "flat" price substantially below the Class I price applicable to regulated handlers. Proponent claimed that in view of the high Class I utilization at these plants this cost for raw milk supplies gives the plants a significant price advantage over competing regulated handlers on their Class I sales.

The regulation of the Texarkana area was opposed by the operators of the unregulated plants. Opponents contended that disorderly marketing conditions do not exist in the area. Also, they claimed that their supply sources and sales areas are more closely associated with the State of Arkansas and that the regulation of the Texarkana area, if at all, should be under the Central Arkansas order.

Regulation was opposed also by a dairy farmer who delivers milk to one of the Texarkana plants. He believed that regulation would not be beneficial to local dairy farmers because the order probably would result in lower returns to such farmers. He indicated his position reflected the views of most of the other dairy farmers supplying this plant.

The record supports proponent's contentions regarding the purchase arrangements for milk at the Texarkana plants. The prices received by proponent between January 1972 and June 1973 for monthly deliveries to one of the plants ranged from 24 to 87 cents per hundredweight under the North Texas Class I price applicable at Texarkana. Farm prices reportedly paid by the other plant during January through October 1973 averaged 45 cents

under the order Class I price. At the same time, both plants have a very high Class I utilization of milk.

It is difficult to conclude, however, that this lower cost for Class I milk at the Texarkana plants makes it imperative that the plants be fully regulated under the merged order and subject to classified pricing. The only areas in which the Texarkana plants and Texas regulated handlers have any significant overlaping of fluid sales are the counties of Red River and Morris in the North Texas marketing area. Unregulated sales in Red River County are an estimated 60 percent of the total fluid sales in that area. In Morris County, unregulated sales make up only 8 percent of the total. Neither of these counties is heavily populated. With respect to such unregulated sales, the Texarkana plants pay to the North Texas producer-settlement fund the difference between the Class I price and blend price under the North Texas order. This places the Texarkana plants on essentially the same cost basis under the order with respect to their "in-area" Class I sales as regulated plants.

The only other areas of overlapping sales are the unregulated areas of Texarkana and the counties of Bowie and Cass. In these areas, Texas regulated handlers have no more than 2 percent of the total Class I sales, with such sales representing a very small proportion of their total fluid sales.

These sales patterns do not represent any significant degree of competition between the Texas regulated plants and the Texarkana plants. Actually, the unregulated plants have greater competition with plants regulated under the Central Arkansas order than with Texas regulated plants. These unregulated plants distribute milk in 14 Arkansas counties, one of which is in the Central Arkansas marketing area. On the basis of this record, it would appear that if Texarkana were to be included in a Federal

order marketing area it would be more appropriate to consider its inclusion in the Central Arkansas marketing area. However, this is not the issue before us.

The operator of one of the Texarkana plants proposed that in the event Texarkana and the counties of Bowie and Cass are added to the merged marketing area, thereby causing regulation of the plant, the marketing area should be expanded further to include 10 Arkansas counties that encompass the primary sales area of the plant. These counties are Columbia, Hempstead, Howard, Lafayette, Little River, Miller, Nevada, Pike, Sevier and Union. Since it is concluded that the Texarkana area should not be a part of the merged marketing area, the proposal concerning these 10 Arkansas counties becomes moot and, accordingly, is not considered further in this decision.

Although some of the route disposition of regulated handlers will extend beyond the boundaries of the merged marketing area, it is neither practical nor reasonable to extend the regulated area to cover all areas where a handler has or might develop some route disposition. Nor is it necessary to do so to accomplish effective regulation under the order. The marketing area herein proposed is a practical one in that it encompasses the great bulk of the fluid milk sales areas of regulated handlers.

All producer milk received at regulated plants must be made subject to classified pricing under the order, however, regardless of whether it is disposed of within or outside the marketing area. Otherwise, the effect of the order would be nullified and the orderly marketing process would be jeopardized.

If only a regulated handler's "in-area" sales were subject to classification, pricing and pooling, a regulated handler with Class I sales both inside and outside the mar-

keting area could assign any value he chooses to his outside sales. He thereby could reduce the average cost of all his Class I milk below that of other regulated handlers having all, or substantially all, of their Class I sales within the marketing area.

Unless all milk of such a handler were fully regulated under the order, he in effect would not be subject to effective price regulation. The absence of effective classification, pricing and pooling of such milk would disrupt orderly marketing conditions within the regulated marketing area and could lead to a complete breakdown of the order. If a pool handler were free to value a portion of his milk at any price he chooses, it would be impossible to enforce uniform prices to all fully regulated handlers or a uniform basis of payment to the producers who supply the market.

It is essential, therefore, that the order price all the producer milk received at a pool plant regardless of the point of disposition.

4. (a) *Milk to be priced and pooled.* It is necessary to designate clearly what milk and which persons would be subject to the merged order. This is accomplished by providing definitions to describe the persons, plants and milk to which the applicable provisions of the order relate.

The following definitions included in the proposed order will serve to identify the specific types of milk and milk products to be subject to regulation and the persons and facilities involved with the handling of such milk and milk products. Definitions relating to handling and facilities are "route disposition," "plant," "pool plant" and "nonpool plant." Definitions of persons include "producer," "handler," "producer-handler" and "cooperative association." Definitions relating to milk and milk products in-

clude "producer milk," "fluid milk product," "fluid cream product," "filled milk" and "other source milk." A number of these definitions were of particular issue at the hearing and are discussed below.

Plant. A "plant" definition should be provided for the purpose of designating the type of milk handling facilities to which the order provisions would apply. A plant would be the land, buildings, facilities, and equipment constituting a single operating unit at which milk or milk products are received, processed or packaged. Separate facilities without stationary storage tanks which are used only as a reload point for transferring bulk milk from one tank truck to another would not be a plant. Similarly, separate facilities used as intermediary distribution points in the disposition of packaged fluid milk products would not be plants.

The "plant" definitions in the Corpus Christi, North Texas and South Texas orders provide that milk transferred from one truck to another at reload points must be identifiable as receipts from specific farmers until it is received at a plant. Also, the North Texas and South Texas orders do not preclude reload points from containing storage tanks. The Austin-Waco, Central West Texas and San Antonio orders do not define a "plant."

Under the provisions adopted herein, producer milk would be priced at the plant where it is physically received. It is necessary, then, to have guidelines for determining whether or not certain milk handling facilities should be considered as a plant. It is not intended under this order that facilities used only for the reloading of milk from one tank truck to another be the pricing point for milk so handled. The facilities must be distinguishable, however, from facilities at which milk handled is to be priced.

It is not the usual nature for a reload point to have stationary storage tanks for the holding of milk for one or two days. Rather, it is customary for milk that has been picked up at the farm by several tank trucks to be brought to the reload point and transferred directly to a large over-the-road tank truck for movement to processing plants. Accordingly, the absence of any stationary storage tanks is a reasonable means of distinguishing a reload facility from a plant.

Situations could arise where the individual producer identity for milk handled at reload points is lost. Some of the milk on a farm pick-up tanker could be reloaded onto an over-the-road tank truck and delivered to a pool plant while the remaining milk on the farm truck is held overnight in a tank truck and perhaps transported to a nonpool plant the next day. In this situation, it is not possible to know which producer's milk was delivered to which plant on which day. It is necessary, nonetheless, for the order to provide for the pricing of the milk of these dairy farmers at a plant location. The reload facility, not qualifying as a plant, cannot be the pricing location in this case for such milk.

As described later in this decision, it is provided that milk picked up at a producer's farm during the month in a tank truck owned and operated by, or under the control of, a handler (including a cooperative association in its capacity as a bulk tank handler) but which is not received at a plant until the following month shall be considered as having been received by the handler during the month in which it is picked up at the producer's farm and shall be priced at the location of the plant where the milk is physically received in the following month.

Except for the treatment of milk picked up at a producer's farm in one month that is not delivered to a plant

until the following month, the administrative guidelines now in effect in the six markets under consideration, rather than the order provisions suggested by proponent, should be relied upon in applying the order provisions under the milk handling situation just described. These guidelines, which are discussed later in more detail under the heading "Definition of a receipt.", are being used by market administrators for a number of orders in applying order provisions to various milk receiving operations. These guidelines provide that under the conditions described above the milk of individual producers would be prorated between the plants at which their commingled milk was received.

Pool plant. Essential to the operation of a market-wide pool is the establishment of minimum performance requirements to distinguish between those plants substantially engaged in serving the fluid needs of the regulated market and those plants that do not serve the market in a way or to a degree that warrants their sharing (by being included in the pool) in the Class I utilization of the market. The pooling standards for distributing plants, supply plants, and cooperative balancing plants that are contained in the attached order would carry out this concept under present marketing conditions.

The "pool plant" definition adopted herein sets forth all the requirements that a plant must meet in order to be defined as a pool plant. For this reason, definitions of a "distributing plant" and a "supply plant," as proposed by the merger proponent, are not provided in the attached order. Reference is made in this decision to such types of plants, nevertheless, since the adopted pooling standards relate to plants performing different types of functions in the market.

A requirement common to all types of pool plants is that the plants be approved by a duly constituted regulatory agency for the handling of Grade A milk. The term "regulatory agency," rather than the term "health authority," which has been commonly used in the Texas orders for some time, is a more appropriate term at the present time. The agency responsible for approving a plant for the handling of Grade A milk may not always be designated as a health authority. In some states, for example, this function is the responsibility of the State Department of Agriculture.

The following discussion sets forth the pooling standards that should apply to the several different types of plants. To facilitate the discussion, it is convenient to note at this point that the pooling standards for a distributing plant or a supply plant provide that the plant's required association with the market shall be measured in terms of the proportion of its receipts that is disposed of from the plant. In this case, such receipts should include producer milk that is diverted from the plant to other plants. Although diverted milk is not physically received at the plant from which diverted, it is, nevertheless, an integral part of the plant's supply of milk.

A cooperative objected to this pooling standard in its exceptions to the recommended decision. It indicated that a plant operator could decide not to have milk being diverted from the plant by the cooperative included in the plant's receipts. Should this occur with little advance notice, the cooperative claimed, the cooperative might be unable to make delivery arrangements that would keep the milk pooled on the market. The cooperative asked that milk diverted by a cooperative association not be included in any plant's receipts in determining whether a plant has met the order's pooling standards.

Without associating producer milk with some pool plant, the pooling standards are weakened. Such standards are intended to insure that the milk supplies eligible to share in the Class I proceeds in the pool are those that have a reasonable association with the Class I market. Diverted milk that is not associated with a specific plant is, in effect, a "floating" supply of milk that may be used for manufacturing irrespective of the limitations that the pooling standards are intended to place on the amount of milk that may be associated with the pool for other than Class I uses.

It should be noted also that milk diverted to a pool supply plant from a pool distributing plant should not be included in the supply plant's receipts for the purpose of measuring the supply plant's association with the market. The quantity of milk so diverted would be included in the distributing plant's receipts in order to measure this plant's association with the market. Since such milk would be considered a part of the distributing plant's regular supply, it should not be considered as a receipt at the supply plant for pool plant qualification. If the inclusion of such milk in the supply plant's receipts for pooling purposes resulted in the plant not meeting the shipping standard of the order, the supply plant's manufacturing facilities might not be available to the market. For the same reason, milk diverted to a pool supply plant from another order plant for manufacturing likewise should not be included in the supply plant's receipts for pooling purposes.

Thus, when referring herein to a plant's receipts used in computing pooling percentages, it is intended that such receipts include producer milk diverted from the plant. Also, it is intended in the case of a supply plant that its receipts not include milk diverted to the plant.

Under the adopted pooling standards, any plant approved for the handling of Grade A milk would be a pool plant if during the month its total route disposition equals 50 percent or more of its Grade A receipts of fluid milk products and its route disposition in the marketing area equals at least 10 percent of such receipts. Two plants of a handler that each meet the 10 percent requirement but not the 50 percent requirement still could qualify as pool plants if the combined route disposition of such plants is 50 percent or more of the combined Grade A receipts at such plants. As under the present orders, route disposition of a plant would be exclusive of any disposition of filled milk.

These pooling standards for distributing plants are basically the same as those proposed by the cooperative association advocating the merger. Except for the unit pooling arrangement contained only in the North Texas order, the adopted standards are the same as those now applicable under the North Texas, South Texas, and Corpus Christi orders. The pooling standards under the Austin-Waco, Central West Texas, and San Antonio orders differ in various respects, most notably with respect to the absence of any total route disposition requirement. There is no indication, however, that the adopted pooling standards would cause any distributing plants now regulated under the six orders to lose their status as fully regulated plants.

The operator of a South Texas distributing plant urged a relaxation of the pooling standards for distributing plants. He proposed lowering the in-area route disposition requirement to 5 percent of total route disposition, and lowering the total route disposition requirement to 30 or 35 percent of the plant's total receipts. Proponent stated that the lower pooling requirements are necessary to im-

pede an unregulated distributing plant operator from distributing relatively small amounts of milk in the marketing area at unrealistically low prices and thereby disrupt the pricing structure of the entire market.

Requiring that a pool distributing plant dispose of at least 50 percent of its Grade A receipts on routes is consistent with the general supply situation for the area under consideration. Except during the months of seasonally heavy production, milk supplies in Texas are somewhat short relative to the demand in the area for Class I milk. It is essential in this circumstance that available milk supplies in the market be channeled primarily into fluid uses. For this reason, a pool distributing plant in this market should be primarily engaged in the fluid milk business and not in the manufacture of milk products. Accordingly, the proposal to lower the total route disposition requirements to 30 to 35 percent should not be adopted.

An exception to this 50 percent disposition requirement has been applicable for some time under the North Texas order and should be continued under the merged order. A handler who is affected by this provision operates two plants—one at Dallas and one at Fort Worth—that are presently regulated under the North Texas order. The Dallas plant has a very high Class I utilization. The Fort Worth plant does not have sufficient Class I utilization to qualify as a pool distributing plant on the basis of its own performance. However, the two plants qualify on the basis of their combined utilization.

This provision should be limited in its application to only two plants of a handler. With the merger of orders, several handlers will be operating more than two distributing plants under the single order. Without the adopted limitation, such handlers might be encouraged to combine all of their plants into a unit and develop manufacturing

operations. As just indicated, milk supplies should be channeled primarily into fluid uses.

A plant distributing less than 10 percent of its receipts inside the marketing area should not be a fully regulated distributing plant under the merged order. Such regulation is not necessary to assure the orderly marketing of milk in the proposed market.

As described earlier in the findings on marketing area, there are two partially regulated distributing plants at Texarkana that distribute milk in the present North Texas marketing area. The operators of these plants pay their dairy farmers somewhat less than the North Texas Class I price for milk distributed on routes. Several witnesses expressed concern that in this situation regulated handlers cannot compete effectively with the Texarkana plants for fluid sales in the marketing area unless the Texarkana plants become fully regulated. For this reason, it was proposed that the distributing plant pooling standards be lowered to the point where even very limited sales in the marketing area from these plants would cause them to become fully regulated.

The two Texarkana plants are the only unregulated distributing plants known to have any association with the proposed Texas market, or expected to have in the future. The record does not indicate that sales in the marketing area by these plants are causing disorderly marketing conditions. Payment provisions applicable to such plants are contained in the attached order to assure that route disposition in the marketing area from the plants is treated in such a way as to minimize any buying advantage on raw milk that these plants might have relative to fully regulated handlers. In these circumstances, a lower in-area sales requirement than that adopted herein is unnecessary, and the proposal for such is denied.

For the same reasons, the proposal by the merger proponent to base the minimum in-area route disposition requirement on the plant's total route disposition during the month rather than on the plant's Grade A receipts should not be adopted. The effect of this proposal would be to lower the in-area sales requirement. As indicated, this is unnecessary under the present circumstances for the maintenance of orderly marketing.

A handler who operates distributing plants regulated under the North Texas and South Texas orders as well as one of the unregulated distributing plants at Texarkana proposed that any distributing plant located outside the marketing area be a nonpool plant. It was proposed that only the portion of the plant's route disposition that is in the marketing area be subject to regulation. The only reason given for the adoption of such a provision was that a similar provision is contained in a New York State milk order that regulates the handling of milk in the Niagara Frontier market.

The essence of this proposal is not whether regulation is to be based on the location of the distributing plant but rather whether full regulation should apply to a plant that has distribution both inside and outside the marketing area. A plant could be located inside the marketing area but exempt from regulation on its out-of-area distribution and the regulatory effect would be the same as under the handler's proposal.

Under the adopted provisions, a plant primarily engaged in the fluid milk distribution business would be a pool plant if it has route disposition in the marketing area equal to at least 10 percent of its Grade A receipts. If the plant's in-area sales are less than this, the plant would be subject to regulation on only its in-area sales. In this latter case, the plant, with its limited degree of

association with the regulated market, is not a major competitive factor for fully regulated handlers whose sales are largely or entirely in the marketing area. Thus, the plant need not be fully regulated. However, to minimize any price advantage that the plant might have on the limited in-area sales, the order would require a pool payment on such sales equal to the difference between the order's Class I and blend prices. As an alternative, the plant could pay its dairy farmers the classified use value for all receipts. These payment arrangements have been applicable under the marketwide pool orders in Texas for many years.

It is necessary, however, that a plant, wherever located, that distributes 10 percent or more of its receipts in the marketing area be subject to full regulation on all of its Class I distribution, including that which is outside the marketing area. If only the plant's in-area sales were subject to order pricing, the operator of the plant could assign any value he might choose to his out-of-area sales. He thereby could reduce the average cost of all his Class I milk below that of fully regulated handlers having all of their Class I sales within the marketing area. Unless his route sales both inside and outside the marketing area were fully regulated under the order, the plant operator in effect would not be subject to effective price regulation. It would not be possible in this circumstance to enforce uniform class prices with respect to those handlers who are in substantial competition with one another. The absence of effective pricing would disrupt orderly marketing conditions within the regulated marketing area and could lead to a complete breakdown of the order.

In his exceptions to the recommended decision, the proponent handler opposed the Acting Administrator's conclusions on this issue. The handler's exceptions provide

no basis, however, for taking a different position on this matter.

Any plant approved for the handling of Grade A milk that does not qualify as a pool distributing plant should be a pool plant in any month in which 50 percent or more of its receipts of Grade A milk from dairy farmers and cooperatives acting as bulk tank handlers is transferred in the form of bulk fluid milk products to pool distributing plants. A plant that was pooled on this basis during the month of November should be required in December, however, to ship only 15 percent of its receipts to qualify as a pool plant that month. Similarly, a 15 percent shipping requirement should apply in August in the case of a supply plant that was pooled in the preceding month of July. A plant which was pooled by virtue of its shipments in each of the months of September through January should be accorded pool plant status during the following months of February through July regardless of its shipments to distributing plants during such months.

A supply-type plant that does not otherwise qualify as a pool plant under any order should be permitted to be a pool plant under this order in any month in which 50 percent or more of its receipts of Grade A milk from dairy farmers and cooperatives acting as bulk tank handlers is transferred in the form of bulk fluid milk products to distributing plants fully regulated under Federal milk orders, if the quantity transferred to distributing plants pooled under this order exceeds the quantity transferred to distributing plants regulated under any one of the other Federal orders. A plant pooled on this basis during the month of November should be required in December to ship only 15 percent of its receipts to qualify as a pool plant. However, such shipments must be to distributing plants pooled under the Texas order. A similar 15 per-

cent shipping requirement should apply in August in the case of a plant that was pooled in the preceding month of July. A plant which was continually pooled in each of the months of September through January should be accorded pool plant status during the following months of February through July regardless of its shipments to distributing plants during such months. A plant qualifying on this basis that was not pooled in each of the months of September through January should be permitted to be pooled on the basis of this 50 percent combined shipping concept during the months of February through July only if the plant was pooled in at least three of the preceding months of September through January.

Several different proposals were made by producer groups and proprietary handlers regarding the appropriate pooling standards for supply plants. The cooperative proposing the merger urged that the pool supply plant provisions of the North Texas order, with certain modifications, be continued under the merged order. The North Texas order now provides that a supply plant be pooled during any month in which 50 percent or more of its receipts is shipped to pool distributing plants and assigned "reserve supply credit."[2] A supply plant also is pooled during any month in which 15 percent or more of its receipts is moved to pool distributing plants and assigned reserve supply credit if such month is the last month of a period of four or less consecutive months during which the plant shipped an average of 50 percent or more of its receipts to pool distributing plants and to which reserve supply credit was assigned. A supply plant that is pooled during

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2. "Reserve supply credit" is a reflection of how much Class I utilization is available at a distributing plant for assignment to milk received from supply plants. Receipts directly from farms have first priority on the distributing plant's Class I utilization.

each of the months of September through December under the North Texas order is afforded automatic pool plant status for the following months of January through August, although in August it must ship at least 15 percent of its receipts of Grade A milk and have reserve supply credit assigned to it.

Proponent would modify these provisions, however, to include December as a month in which automatic pool plant status applies and add January as a qualifying month. The cooperative indicated that because of the holiday season and the closing of schools the demand for milk in December is less and shipments of milk to distributors by supply plants should not be required that month. Proponent contended that in January, however, demand for milk is strong and supply plant shipments are needed.

The cooperative also proposed that any supply plant having automatic pool plant status during certain months should not be able to pool during any of such months more than 150 percent of the monthly average quantity of milk it pooled during the applicable qualifying months. Proponent stated that this would prevent the operator of such plant from adding producers during the flush production months when there is not a need for additional milk on the market.

A distributing plant operator regulated under the South Texas order and a cooperative association that operates a supply plant proposed that a supply plant should ship during each of the qualifying months in the fall at least 75 percent of its receipts to pool distributing plants if it is to have automatic pooling status during the flush production months. Also, they would delete the North Texas order provision that allows a supply plant to be pooled on the basis of limited shipments during the month

if shipments during a given period encompassing such month average at least 50 percent of the plant's receipts.

These parties testified that the more stringent pooling requirements are necessary to assure that a supply plant is not associated with the market for purposes of "loading" the pool. They maintained that milk production in Texas is generally adequate for supplying consumers in the proposed marketing area and that the higher pooling standards are necessary to discourage the association of supply plants outside the State with the Texas market.

A distributing plant operator regulated under the Corpus Christi order testified that only supply plants located in Texas should be afforded the opportunity to obtain automatic pool plant status. The handler indicated that this is necessary to assure that a supply plant has a meaningful association with the market.

Four supply plants are regulated under the separate orders, each of which is operated by a cooperative association. Plants at Blum and Houston, Texas, are regulated under the South Texas order. A plant at Falfurrias, Texas, is pooled under the Corpus Christi order, while a plant at Wichita, Kansas, is regulated under the San Antonio order. These plants serve the important function of assembling milk supplies from producers' farms for shipment to pool distributing plants.

Supply plant pooling standards for the merged order should assure that supply plants associated with the market will make milk available to distributing plants at the times and in the quantities needed. The pooling standards adopted herein are designed to provide this assurance.

The shipping requirements set forth in the attached order, except for the months of August and December, are the same as the minimum shipping requirements now ap-

plicable in the separate orders under which the existing four pool supply plants are now regulated. There is no indication that the present 50 percent standard has not served the intended purpose of identifying an appropriate association of supply plants with the market and insuring sufficient milk supplies for distributing plants. In fact, shipments from these plants to pool distributing plants have not been limited to the minimum quantities and months required for pooling such plants. Continuation under the merged order of the 50 percent shipping requirement should assure that supply plants pooled under the order are adequately associated with the market.

Notwithstanding, the demand for supply plant milk is not as great in some months as others. To avoid unnecessary, as well as uneconomical, movements of milk to the market merely to assure the continued pooling of a plant, the merged order should require in certain months only limited shipments to distributing plants, and in other months no shipments, for those plants with an established association with the market.

If a supply plant is pooled under the order in each of the months of September through January, it should be designated as a pool plant for the following months of February through July irrespective of its shipments to pool distributing plants or plants regulated under another order. The plant should be accorded nonpool plant status during this February-July period, however, if such status is elected by the plant operator or if the plant loses its approval to handle Grade A milk.

The demand for supply plant milk is usually less during the months of seasonally heavy milk production than during the other months. Also, demand tends to drop during the summer with the closing of schools. With nearby milk supplies generally more adequate during the Febru-

ary-July period relative to consumer demand distributing plants need not rely as much on supply plants for a full supply of milk. Thus, no minimum shipments should be required in the months of February through July for a plant that was a pool supply plant during the qualifying months.

Although it was proposed by the merger proponent that August and December be included in the months of automatic pooling, but with limited shipments required in August, it is concluded that a pool supply plant should be required to ship at least 15 percent of its receipts to pool distributing plants in both months. This lower shipping percentage should apply only to those plants that were pooled during the immediately preceding month and should reflect only shipments to pool distributing plants. Unless this procedure is followed a plant could become pooled on the market on an opportune basis with little or no commitment of milk supplies for fluid use. The plant's dairy farmer suppliers would share, nevertheless, in the Class I proceeds of the fluid market.

During the latter part of August, the opening of schools causes an increase in demand for fluid milk. At the same time, milk production is beginning its seasonal decline. The demand for supply plant milk in August is thus somewhat greater than in the earlier months of automatic pooling.

The situation in December, although nearly the reverse of the August situation, still results in about the same need for supply plant milk. In December, the demand for milk is reasonably strong during the first part of the month. Demand falls off considerably during the latter part of the month, however, with the closing of schools and the holiday season. Also, handlers tend to reduce their milk inventories to a minimum on December 31.

Proponent maintained that no shipments should be required from pool supply plants in December because of the decline in the demand for milk. However, the total demand for milk in December is as great as it is in August. For the months of August 1972 and 1973, the percent of producer milk used in Class I in the six markets combined was 73 and 75 percent, respectively. For the following December of each year, the comparable utilization percentage was 78 and 74 percent, respectively. Also proponent's deliveries of member milk to distributing plants in the six markets combined in December 1972 were 86 percent of its total member milk on these markets, while in August 1973 such deliveries were 81 percent of the total.

It is also appropriate to pool under the merged order in any of the months of September through January a plant not otherwise meeting the pooling requirements of this or any other Federal order if its combined shipments to distributing plants fully regulated under Federal orders are 50 percent or more of its receipts from dairy farmers and cooperatives in their capacity as bulk tank handlers and greater shipments are made to distributing plants regulated under this order than to distributing plants regulated under any one of the other Federal orders.

The cooperative association advocating the merger operates a plant located at Hillsboro, Kansas, which for several years had been regulated as a cooperative balancing plant under either the North Texas or South Texas order. As described later in this decision, the pooling provisions adopted herein would preclude the pooling of this plant as a cooperative balancing plant under the merged order. On the basis of its present operations, the plant also would not meet the supply plant pooling standards adopted herein under which 50 percent of the receipts must be shipped to distributing plants in the Texas market.

Because of its location some 400 miles from the adopted marketing area, the Hillsboro plant functions essentially as a supply plant rather than as a balancing plant. Most of the Kansas production that is delivered to Texas distributing plants is received first at the Hillsboro plant. There it is reloaded onto other trucks for delivery to the market. This plant also supplies substantial quantities of milk to distributing plants regulated under other Federal orders, e.g., Kansas City, Memphis, Oklahoma Metropolitan, Central Arkansas, Texas Panhandle, Fort Smith, and Wichita. During the months of September, October, and November 1972 and January 1973 for example, the plant's monthly shipments to distributing plants regulated under these particular orders plus the six orders to be merged ranged from 88 to 99 percent of the plant's receipts of producer milk. Producer milk not needed by distributors is retained at the plant for manufacturing.

The Hillsboro plant is relied upon for furnishing milk to Texas distributing plants. This is particularly so during the fall months when production normally declines and milk must be imported into Texas from outside production areas. During the months of September, October and November 1972 and January 1973, shipments from this plant to distributing plants that would be regulated under the merged order ranged from 22 to 66 percent of its producer receipts. To assure the availability of such milk, the cooperative operating the plant regularly maintains Texas health approval for a number of its Kansas members and the Hillsboro plant.

In view of these supply arrangements that have existed for several years, it must be recognized that the Hillsboro plant serves an important supply plant function for this market even though its shipments to Texas distributing plants usually are somewhat less than 50 percent

of its Grade A receipts. When total shipments from this plant meet the 50 percent shipping requirement (based on its deliveries to all Federal order markets), this plant should be pooled, nevertheless, under the Texas order if the plant has the greatest association with the Texas market. Even though shipments to all Federal order markets would be used for qualifying purposes, the 50 percent standard would assure that the plant is performing a supply function. Such a plant would not be able to associate with the market for other than fluid uses any greater proportion of its receipts than supply plants that ship only to Texas distributing plants. Qualifying shipments should be limited in this case to those made to distributing plants regulated under Federal orders. Only under this arrangement can there be any reasonable assurance that the plant is basically supplying milk for fluid uses.

It also must be recognized that to assure orderly marketing in Texas some reasonable means must be provided to accommodate the pooling in the Federal order system of Grade A milk supplies that are available for fluid use in several markets. Otherwise, such supplies could become a disruptive factor in Federally regulated markets such as the combined Texas market. It is presumed that such milk will be pooled under one order or another irrespective of the uneconomic adjustments that may need to be made by a cooperative in the handling of milk. For example, the Hillsboro plant presumably could qualify as a pool supply plant under the Texas order if the cooperative were to make the necessary Class I outlets available by taking the Texas production that normally would be going directly to distributing plants in Texas and moving it instead to the cooperative's Muenster and Sulphur Springs plants for manufacturing. This would be an uneconomic handling arrangement and it should not be encouraged.

Over the years the cooperative operating the Hillsboro plant has closed some of its smaller, less efficient, supply-type plants and has consolidated the milk supplies in a few large plants that operate much more efficiently. These plants (e.g., Hillsboro) perform the same vital supply function as the smaller plants did previously. In the case of the Hillsboro plant, it performs this function for several markets. To the extent that such a plant has a greater association with this market than it does with any other market, it is appropriate that this order permit the pooling of such a plant if it delivers at least 50 percent of its Grade A receipts to distributing plants regulated under Federal orders. This pooling provision will recognize the uniqueness of the Hillsboro operation and at the same time will provide definitive standards for the pooling of any other plant under similar circumstances. This will promote the orderly and efficient marketing of milk in the merged marketing area.

In recognition of the reduced performance requirements prescribed for supply plants in the months of August and December and to insure the continuing integrity of regulation, it is appropriate to require that the prescribed 15 percent shipping requirement to distributing plants under this order must be met and in each such month the plant may pool under such reduced shipment only if the plant held pool status in the immediately preceding month. Such a plant which was continuously pooled under the merged order in the months of September through January should be accorded automatic pooling status in the months of February through July under the identical terms as that accorded regular pool supply plants.

Because the shipments made to the market from such a plant can be substantially less than the 50 percent required for regular supply plants, it is not practical to per-

mit a plant to otherwise pool under the combined shipping concept during the flush production months unless such plant was pooled in at least 3 of the preceding months of September through January. Only in such circumstances will the plant have demonstrated an association with the market sufficient to permit pooling during the flush months under the combined shipping concept. Unless these safeguards are prescribed, it is likely that the merged order would provide a haven for pooling that milk not otherwise qualifying for pooling under other orders.

In their exceptions to the recommended decision, a South Texas handler and a cooperative association contended that the adopted pooling standards for plants, and particularly those that might apply to the Hillsboro plant, would continue to permit the association of unneeded milk supplies with the Texas market. Exceptors claimed that although the present pooling standards would be changed, the same plants and milk supplies now pooled under the individual orders would still be pooled under the merged order. It was their position that these milk supplies are substantially in excess of the Class I needs of the Texas market and that no more than a 20 percent reserve should be carried in the pool. They reiterated their position taken at the hearing that the Hillsboro plant has been inappropriately pooled in Texas and that the milk supplies associated with the plant actually have more association with other markets and should not be pooled under the Texas order.

As already set forth herein, it is concluded that the Hillsboro plant should not be permitted to be pooled as a cooperative balancing plant since it actually operates in the customary manner of supply plants. The present supply plant pooling standards are modified, however, to recognize the particular operations of the Hillsboro plant

relative to the supplying of milk to other markets as well as to the Texas market. There is no certainty, of course, that this plant will meet these standards. However, should the Hillsboro plant or any other plant meet such standards, the plant would be reasonably associated with the Texas market. It is reemphasized that such a plant would not be able to associate with the market for other than fluid uses any greater proportion of its receipts than supply plants that ship only to Texas distributing plants.

The pooling standards adopted herein are not designed to necessarily lessen the amount of milk that may be associated with the area under consideration. The milk supplies now being pooled under the six orders are in reasonable balance with the Class I needs of the markets. During the 1972 and 1973 short-production months of September, October and November, for example, producer receipts in the present six-market area were 117 percent and 121 percent, respectively, of the total Class I use of handlers. This is at least the minimum amount of reserve milk that customarily needs to be associated with the Texas market. This means, of course, that on an annual basis the market reserve will be somewhat greater because of the normal seasonal increase in milk production without a corresponding increase in demand.

Certain transitional provisions are needed in the merged order to assure that supply plants that have demonstrated an adequate association with the individual markets included in the merger will be eligible under the merged order for automatic pooling through July 1975, as well as for limited shipping privileges in August 1975. For this purpose, such eligibility shall be deemed to have been established if the plant was a pool supply plant under any of the six orders to be merged (or any combination thereof) during the months of Sep-

tember, October and November 1974. Each of the six orders now bases automatic pool plant status on at least these three months.

The adoption of proposals to limit automatic pool plant status to only those supply plants that are located in Texas or that shipped at least 75 percent of their receipts to distributing plants during the qualifying months would result in an inconsistent set of pooling standards for supply plants associated with the proposed Texas market. Any supply plant shipping no more than 50 percent of its receipts to distributing plants regulated under any order during the qualifying months could be pooled under the order in such months. At the same time, however, supply plants desiring automatic pooling status would have to ship at least 75 percent of their receipts during the same months. The purpose of the pooling standards for supply plants is to assure that such plants associated with the market will make milk available to distributing plants for fluid use. There is no need during the qualifying months to have certain supply plants make 75 percent of their milk available while other plants make 50 percent available.

The point could be raised, of course, that in this case all supply plants should be subject to the proposed 75 percent shipping requirement. There was no demonstration on the record, however, that a shipping standard at this level is necessary to assure that supply plants will make adequate quantities of milk available to distributing plants for fluid use.

Whether located inside or outside Texas, any supply plant that has met the minimum shipping requirement during the qualifying months has demonstrated a bona fide association with the market. If a plant has established this association with the market, there is no basis

for precluding automatic pooling status for the plant just because it may be located outside Texas.

As noted earlier, a supply plant that has been pooled under under the San Antonio order for an extended period of time is located at Wichita, Kansas. This plant has had a regular association with the market. If it continues to have the same association with the proposed Texas market, there is no reason to deny this plant automatic pooling status just because it is located outside Texas.

Continuation of the North Texas order provision that allows a supply plant to be pooled on the basis of shipments during the month equal to 15 percent of its receipts if shipments during a given period encompassing such month average at least 50 percent of the plant's receipts is not necessary under present market conditions. Proponent urged its adoption under the merged order but did not relate the need for this provision to any current market situation.

This provision was added to the North Texas order in 1955 to accommodate a situation involving a number of producers in Missouri and Arkansas and the pooling of their milk on the North Texas market through a supply plant at Monett, Missouri. These producers had a different seasonal variation in production of milk as compared with other producers on the market and it was concluded that because of this the Monett plant would have difficulty meeting the 50 percent pooling requiremen during each of four qualifying months even though the milk from these more distant producers was needed to meet the market's year-round fluid requirements.[3]

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3. Official notice is taken of the Acting Secretary's decision issued September 13, 1955, with respect to the North Texas milk order (20 FR 6969).

Although the Monett plant is not on the market, there is no indication that the seasonal variation in milk production by other distant producers differs significantly from the seasonal variation of nearby producers or that any of the present supply plants would have difficulty meeting the 50 percent pooling standard during each of the qualifying months. For the months of August and December, the order already would require qualifying shipments of only 15 percent if the supply plant was pooled in the previous month. Thus, the only time such a provision could have any practical application would be during the months of February through July. These are the months when the demand for supply plant milk is expected to be the lowest and the order should not contain a provision that would encourage the pooling of new supply plants during such months by lowering the pooling standards.

The proposal to limit the quantity of milk a supply plant with automatic pooling status could associate with the market during the months of February through July should not be adopted. The purpose of the proposal is to discourage the adding of milk to the pool during the flush production months when usually it would not be needed for fluid use. This could be easily done by a supply plant with automatic pooling status since it would not have to meet any shipping requirements in these months. Although this concept has merit, it is concluded that the attachment of unneeded supplies to the market can be precluded more effectively through the use of a "dairy farmer for other markets" provision. This is described in detail in the discussion on the definition of a "producer."

Qualification as a pool supply plant should not be contingent on the assignment of "reserve supply credit" to the plant's shipments to pool distributing plants. Such

a requirement is now contained in the North Texas order and was proposed for the merged order. The other five orders under consideration do not establish a supply plant's pool status on this basis.

"Reserve supply credit" is, in essence, a reflection of how much need there is at a pool distributing plant for supply plant milk. It is only through shipments to a pool distributing plant, of course, that a supply plant can become associated with the market. Under this provision, any supply plant that can't find a Class I outlet for nearly half of its Grade A receipts from farms cannot qualify as a pool plant.

Reserve supply credit is determined monthly by subtracting from the quantity of Class I milk at the distributing plant any Class I sales to other pool plants and then subtracting a quantity of milk equal to 85 percent of the milk received from producers and from cooperatives acting as bulk tank handlers. Any remaining Class I use is the reserve supply credit available for assignment to supply plant shipments. Only those shipments to which such credit is assigned can count toward qualifying a supply plant for pool plant status.

There is little basis under present conditions for including the reserve supply credit provision in the merged order. The supply plants now regulated under the separate orders are not subject to a reserve supply credit provision. There is no indication, however, that these plants do not have a bona fide association with the markets where regulated. Moreover, the location adjustment provisions adopted herein will have essentially the same impact on a supply plant's ability to qualify as a pool plant as does the reserve supply credit. Under these provisions, supply plant operators would be granted a trans-

portation credit basically just on those shipments to distributing plants that are needed for Class I use. As under the reserve supply credit provision, receipts at a distributing plant directly from producers or a cooperative acting as a bulk tank handler have first priority on the distributing plant's Class I utilization. Thus, the location adjustment provisions will tend to result in supply plant shipments being made only when there is a Class I outlet for the milk.

The merged order should provide for the pooling of a "balancing" plant operated by a cooperative association if during the month 60 percent or more of the milk of the cooperative's member producers is physically received at pool distributing plants from farms or by transfer from the cooperative's balancing plants for which pool status is requested. The 60 percent requirement should be exclusive of the cooperative's member milk handled through pool supply plants. Such pool status should be limited to those plants that are located in the marketing area and approved by a duly constituted regulatory agency for disposition of Grade A milk in the marketing area. The plant should not be a pool balancing plant if it meets the pooling standards for distributing plants or supply plants under any Federal order.

The cooperative association advocating the merger proposed that the North Texas and South Texas order provisions for pooling a cooperative balancing plant be continued under the merged order, but with certain modifications. The orders now provide for the pooling of a cooperative balancing plant if 50 percent or more of the milk of the cooperative's member producers is received at pool distributing plants by transfer from the cooperative's balancing plants or directly from farms. Proponent's modifications would increase the delivery requirement for

the months of August through November, January and February to 60 percent and would require that the milk handled at the plant be eligible for disposition in the marketing area.

Proponent indicated that the continued pooling of its balancing plants is essential to the orderly marketing of its member milk and to the assurance of adequate and dependable supplies of milk for handlers. It claimed that such plants perform a balancing function for the market by receiving for manufacture any milk not needed by distributors because of changes in consumer demand, week-end surpluses, or seasonal increases in production and by having available reserve supplies of regulated, Texas-approved milk for shipment to distributors during the short production season or at times of peak demand. Proponent contended that such balancing functions could not be carried out effectively or efficiently if its balancing plants now associated with the individual markets were to operate as pool supply plants or nonpool plants under the merged order.

Other parties urged somewhat more restrictive pooling standards for cooperative balancing plants. A handler under the Corpus Christi order proposed that a pool balancing plant should be located in the marketing area, as now required by the Corpus Christi order. The handler contended that without this requirement out-of-area balancing plants with little or no real association with the market could be pooled under the merged order, thereby dissipating the pool proceeds.

A South Texas distributing plant operator and a cooperative that operates a South Texas supply plant likewise proposed that a pool balancing plant be located in the marketing area. These parties also proposed that the

pooling of a cooperative balancing plant be contingent on the cooperative having at least 75 percent of the milk of its member producers delivered to pool distributing plants.

It was the position of these South Texas handlers that the present North Texas and South Texas pooling provisions for balancing plants do not assure that such plants have a meaningful association with the market and that such provisions should not be continued in their present form. The handlers contended that provisions originally intended to permit the pooling of milk legitimately associated with the market have been used in such a way as to add unneeded milk supplies to various Texas markets. They claimed that milk production in Texas is generally sufficient for the proposed Texas market and that manufacturing plants within the State are fully adequate for the handling of the market's excess milk. In these circumstances, it was contended, any pooling of cooperative balancing plants that do not meet specific performance standards should be limited to plants located in the marketing area. The handlers also contended that in the absence of performance requirements for balancing plants an additional safeguard is needed to assure that milk handled at such plants is an essential part of the market supply. Adoption of the 75 percent delivery requirement, it was claimed, would provide this assurance.

There are four cooperative balancing plants now pooled under the separate orders, all of which are operated by the cooperative association proposing the merger. Three plants are located in the proposed Texas marketing area—at Muenster, Sulphur Springs and San Antonio. The other plant is at Hillsboro, Kansas. Until recently, all four

plants had manufacturing facilities. Such facilities at the San Antonio plant are no longer used.

The Muenster plant historically has been associated with the North Texas market, although the plant did shift to the South Texas market in September and October 1972. For many years, the Sulphur Springs plant likewise was a pool plant under the North Texas order. Soon after the inception of the South Texas order in late 1968, however, the plant became a South Texas pool plant and has since been regulated in that market much of the time. It did shift back to the North Texas market during March 1969-April 1970 and in June 1972. In recent years, the San Antonio plant has been a pool plant under the South Texas order in most months. On a few occasions, the plant was pooled under either the San Antonio or Corpus Christi orders. The Hillsboro plant first became associated with the Texas area in December 1970 when it became pooled under the South Texas order. It retained pool status under that order until August 1973 when it shifted to the North Texas market.

The Muenster and Sulphur Springs plant operations typify the usual concept of cooperative balancing plants. The two manufacturing plants are located in a heavy production area from which milk is normally moved directly from producers' farms to distributing plants for fluid use. When some of the milk of producers is not needed by distributors, such as on weekends or during the flush production months, it is moved directly from farms to the balancing plants for manufacturing. The plants also are relied upon by distributors as a source of supplemental supplies when the normal farm-to-distributing plant deliveries are not adequate for current bottling needs. Accordingly, such plants, or other plants in the marketing area that are performing similar balancing

functions, should be accorded pool plant status if 60 percent or more of the milk of the cooperative's member producers is delivered to pool distributing plants.

Pool status for such plants will facilitate the efficient handling of reserve milk associated with the fluid market. When milk of some producers who regularly supply the market is temporarily not needed by distributors, their milk can be pooled by delivery to the balancing plant. The plant thus is an assured outlet for reserve milk without involving arrangements under which the producers' milk would need to be diverted from distributing plants in order to keep the milk pooled on the market. This is an appropriate method of carrying reserve milk in the market pool provided reasonable standards are established to assure that the milk is truly a reserve supply associated with the fluid market.

Pool status for such plants will facilitate also the transfer of milk from cooperative balancing plants to pool distributing plants. Although milk should be moved when possible directly from the farm to distributing plants, there still are occasions when balancing plants are called upon for supplemental supplies. This may be due to surges in demand or limited holding capacity at distributing plants. If the balancing plants are not pool plants, such interplant transfers would be treated at the pool distributing plants as a receipt of other source milk, although the milk received at the balancing plants normally would be largely from producers regularly supplying the market. This would be costly, of course, to the purchasing handler and inequitable to the producers whose milk was received at the balancing plant.

Only those plants located in the proposed Texas marketing area should be eligible for pooling under the pool balancing plant provisions. The marketing area proposed

herein encompasses virtually all of the distributing plants that are expected to be pooled under the merged order, as well as a very substantial part of the production area for the proposed market. For example, in May 1973, over 80 percent of the total producer milk on the six markets combined was from dairy farms located in the proposed marketing area. In this situation, it is only those cooperative association plants located in the marketing area that can be expected to perform the typical market balancing functions as described above.

Requiring a pool balancing plant to be located in the marketing area would preclude, of course, the Hillsboro plant from being a pool balancing plant under the merged order. Unlike the Muenster and Sulphur Springs plants, the Hillsboro plant is located about 400 miles from the adopted marketing area and functions substantially as a supply plant. As indicated earlier, most of the Kansas production that is delivered to Texas distributing plants is received first at the Hillsboro plant where it is reloaded onto other trucks for delivery to the market. Because of the plant's location, the Hillsboro plant is not in a position to perform the typical market balancing functions that are being performed by plants located in the proposed marketing area. As already described, pooling provisions are adopted herein for supply-type plants that should accommodate the Hillsboro operation if the plant demonstrates a reasonable association with the Texas market.

The cooperative operating the Hillsboro plant objected in its exceptions to the requirement that a pool balancing plant must be located in the marketing area. It claimed that this position is contrary to the Department's earlier position on this issue when it amended the North Texas order in 1966. The cooperative further claimed that the in-area requirement is inconsistent with the Department's

denial in this merger proceeding of an in-area requirement for supply plants. It was implied in the exceptions that the Hillsboro plant, although having an association with the Texas market, would not be able to meet the new supply plant pooling standards. Official notice was requested of certain attached data relative to the receipts and disposition of the Hillsboro plant during August through December 1974.

With respect to this latter point, all interested parties must have an opportunity to refute any data offered for or against a proposal. Because there would not be this opportunity, the data proffered by the cooperative in its exceptions may not be taken into consideration at this point in the proceeding.

It is recognized that the position taken herein on the in-area requirement for balancing plants differs from the Department's earlier position relative to the North Texas market. The need for certain order provisions, however, must be based on the marketing conditions prevailing at the time of the hearing. It is not unusual for pooling standards that were found appropriate 8 or 9 years ago to become outdated. Changed conditions often require a change in order provisions.

As concluded earlier, a supply plant meeting the prescribed shipping requirements of the order will have demonstrated a bona fide association with the market. It is not necessary to require the plant to be located within some geographical area. A pool balancing plant, on the other hand, would not have to make any qualifying shipments to distributing plants. This necessitates some other measure of association with the market. For the reasons already indicated, this should be met in part by having the plant located within the Texas marketing area.

Under the circumstances existing in the Texas market, this is a reasonable means of delineating the area in which a balancing plant should be located to be eligible for pooling. Some other means could be devised, of course, such as requiring balancing plants to be within so many miles of certain basing points. As noted earlier, however, it is within the marketing area adopted herein that virtually all of the distributing plants expected to be pooled under the merged order are located. Also, a very major part of the milk supply for the Texas area is produced within the adopted marketing area. Those cooperative association plants in the proximity of both the distributing plants and the major production area are the plants in a position of performing the typical functions of "cooperative balancing plants." Presently, the only existing plants meeting these criteria are those now located within the marketing area adopted for the merged order.

Another cooperative operating in the Texas market also excepted to the in-area requirement for balancing plants. It claimed that the pooling of such a plant should be contingent on the function the plant serves with respect to the milk supply for the market, which is reflected in how much of the cooperative's total member supply goes to distributing plants, and not on the location of the plant. For the reasons previously set forth, this position is not adopted.

It is necessary that there be a reasonable demonstration that the milk pooled through balancing plants is a part of the regular market supply. Milk should not be permitted to be associated with the market merely for manufacturing purposes since this would reduce returns to producers and discourage the production of an adequate supply of milk by producers regularly supplying the fluid market. Any performance requirement for a balancing

plant per se would be inconsistent, of course, with the balancing function of the plant. For this reason, the pooling of a cooperative balancing plant should be contingent on its function with respect to the milk supply for the fluid market and this is reflected in how much of the cooperative's total milk supply from member producers is furnished to pool distributing plants.

Under present marketing conditions, at least 60 percent of the milk of member producers should be delivered each month to pool distributing plants to qualify the cooperative's balancing plants for pooling. This will assure a substantial association of the cooperative's total milk supply with the fluid market and will minimize the opportunity to pool unneeded milk through balancing plants.

Although the cooperative operating the present balancing plants indicated that a 60 percent delivery requirement would be appropriate for certain months, it urged that the minimum delivery requirement be set no higher than 50 percent for the months of March through July and December. It is noted, however, that during the 16-month period of July 1972 through October 1973 for which record data are available the percentage of the cooperative's member milk in the six markets that was delivered to pool distributing plants was 70 percent or more in every month. The cooperative contended that the supply of milk in the six Texas markets during this 16-month period was low relative to demand and that performance in the future at such a high level could not necessarily be expected. It seems likely from this 16-month delivery pattern, however, that the 60 percent requirement could be met each month, even with some increase in milk supplies. The 60 percent standard adopted herein will insure the integrity of the regulation by pooling only that milk which has a bona fide association with the market.

Adoption of the 75 percent delivery requirement, as was proposed by certain handlers, could be expected, on the other hand, to jeopardize the cooperative's ability to qualify its Texas balancing plants for pool status. The plants are serving a valid balancing function for the Texas area and can be expected to do so in the future. A performance requirement at the 75 percent level is not necessary to assure that a reasonable proportion of the total market supply will be made available for fluid use or to preclude the addition of substantial milk supplies solely for manufacturing use.

Pool plant status should be accorded only those cooperating balancing plants located in the marketing area that are approved by a duly constituted regulatory agency for disposition of Grade A milk in the marketing area. Such a provision is necessary to assure that the plant can be depended upon for supplemental milk supplies when such are needed by distributors. Since the merged order would not require any minimum shipments to the market from a cooperative balancing plant, it is conceivable that the plant might not take the necessary steps to maintain its health approval, thereby precluding the plant from being able to transfer milk to pool distributing plants.

It is possible that a distributing plant or a supply plant may meet the pooling requirements of two orders during the same month. As under the present orders, the merged order should provide certain guidelines for determining under which order the plant should be regulated.

A distributing plant that has route disposition in two marketing areas reasonably should be regulated in the market in which it has the greater route sales. However, if a plant that has been regulated under the merged order should have greater sales in another market, the plant

should remain regulated under the merged order until the third consecutive month in which it has greater route disposition in the other marketing area. This procedure, which which proposed by the merger proponent, is now provided in five of the six orders to be merged. This provision obviously has had relevance primarily in the determination of which of the Texas orders a plant would be regulated under. Nevertheless, the possibility of plants being associated with the Texas market and other adjacent markets does exist. Accordingly, this provision should be continued under the merged order.

Pool status should not apply to a supply plant that has automatic pool status under another order but also qualifies as a pool plant under the merged order. On the other hand, a plant having automatic pool status under the Texas order should remain pooled under this order (if the plant operator chooses to retain such status) even though the plant qualifies for pooling status under another order. Similarly, a supply plant that only needs to meet the 15 percent performance requirements during the months of August and December because of having met the higher shipping standards in earlier months should remain pooled under this order even though the plant qualifies for pooling under another order. A supply plant that qualifies for automatic pool plant status or is eligible for pooling under the 15 percent requirement has demonstrated its primary association with this market. Accordingly, it should not lose its pooling status during the months of automatic pooling because of shipments to another order market.

Two South Texas handlers, one of whom operates a supply plant, proposed that a supply plant that qualifies for pooling under two orders be pooled in the market that has the higher percentage of producer milk in Class I, irre-

spective of the quantity of milk shipped to each market. Proponents claimed that this arrangement would help equalize, relative to Class I use, the amounts of reserve milk being carried in the two pools.

The proposals should not be adopted. Such a provision could place a supply plant operator in a position of not always being able to have his plant pooled in the market of his choice. The Class I utilization percentage for each market may vary from month to month for any number of reasons including changes in Class I sales and production and plants shifting in or out of the market. Thus, unless the Class I percentages of the two markets involved were substantially apart, the supply plant operator could not always be certain which market would have the higher Class I utilization each month.

Moreover, in those situations where a supply plant in the Texas market could qualify for pooling in another market as well, the plant operator might be hesitant to offer any milk to the other market if the Class I utilization in the other market were higher. This would be particularly so during the months in which the plant may be qualifying for automatic pool status under the Texas order. Becoming pooled in the other market during any of such months would make the plant inligible for automatic pool status under the Texas order. This situation is not conducive to the orderly marketing of milk.

Guidelines concerning the pooling of a plant in one market or the other were proposed also for a cooperative balancing plant that has an association with more than one market on the basis of interplant transfers. The merger proponent suggested that such a plant be pooled in the market to which the greater quantity of milk is shipped from the plant. The two South Texas handlers just re-

ferred to proposed that a balancing plant be pooled in the market having the higher Class I utilization irrespective of the quantity of milk shipped to each market.

From a technical standpoint, such guidelines would be meaningless under the merged order. In addition to the other standards for pooling a cooperative balancing plant, the cooperative association involved must request pool plant status for the plant if it is to be pooled. This is the common arrangement under Federal orders providing for the pooling of balancing plants. If pool status is requested for such a plant under this order, it must be presumed, of course, that the cooperative would not make a similar request for pooling the plant under some other order. Without such a request, there would be no basis under the other order, then, for pooling the plant as a cooperative balancing plant.

Aside from this point, however, the degree of association of a cooperative balancing plant with one market or another must be considered in terms of the cooperative's total association of member milk with the market since no performance standards for the plant itself are normally required. As provided herein, a balancing plant would be afforded pool status under the Texas order only if 60 percent or more of the milk of the cooperative's member producers is delivered to pool distributing plants. This represents a substantial association of the cooperative's milk with the market, including that which may be handled through the cooperative's balancing plant. Since the pooling standards for cooperative balancing plants would not be based upon minimum qualifying shipments from the plant to distributing plants, the quantity of milk transferred from the balancing plant to any market does not in itself indicate the plant's association with such market. It should be noted that the proposed order would not pool a plant as

a cooperative balancing plant if it has substantial shipments to distributing plants in a particular market and thus meets the pooling standards for a supply plant.

Nonpool plant. The "nonpool plant" definition now contained in the South Texas order should be continued in the merged order. This definition is the same as comparable definitions in the other five orders except for the inclusion of a "governmental agency plant." This additional provision is necessary to continue the exemption from regulation, as now provided by the South Texas order, of a milk plant operated by Texas A and M University at College Station, Texas.

A proposal to prescribe nonpool status for a certain handler's ice cream operation should not be adopted. A handler who operates a distributing plant regulated under the South Texas order manufactures ice cream in a building that is separate from his distributing plant but on the same premises. The handler proposed that the order treat the ice cream operation as a nonpool plant. Such treatment, it was claimed, would place the handler on the same competitive basis as his competitors who manufacture ice cream in nonpool plants using unregulated nonfat milk solids and butterfat.

Although the ice cream operation is located in a building that is separate from the fluid operation, the two buildings are connected by a pipe in which cream and milk are transferred from the fluid milk operation to the ice cream operation. Proponent conceded that milk or milk products conceivably could be run through the pipe in the reverse direction. From a practical standpoint, this physical structure is no different than if the ice cream operation were located in a separate room within the building containing the fluid milk operation. Moreover, nonfat dry milk stored on the premises is used in both the fluid

and ice cream operations. To preclude administrative difficulties in verifying all receipts and utilization of the handler and in determining the proper classification of producer milk received by him, the ice cream operation should be considered as a part of the distributing plant's total operation.

Handler. The impact of regulation under an order is primarily on handlers. The handler definition identifies persons who will have responsibility for filing reports and making payments for milk under the merged order.

Accordingly, the order should designate handler status for the following persons:

(1) The operator of a pool plant;

(2) A cooperative association with respect to milk that is diverted for its account;

(3) A cooperative association with respect to bulk tank milk picked up at the farm for delivery to a pool plant;

(4) The operator of a partially regulated distributing plant;

(5) A producer-handler; and

(6) The operator of another order plant from which milk is disposed of in the market.

Such persons are now defined in most cases as handlers under the six individual orders. It was proposed that the designation of such persons as handlers be continued.

Although a cooperative association would continue in certain situations to be a handler for farm bulk tank milk and for diverted milk, the responsibilities of such a handler should be somewhat different than those now set forth in the individual orders. In the case of bulk tank milk, a co-

operative should be a handler with respect to any such milk which it receives for its account from the farm of a producer for delivery to a pool plant of another handler in a tank truck owned and operated by, or under the control of, such cooperative. However, should there be a mutual arrangement between the cooperative and the plant operator whereby the plant operator will be the handler for such milk and will purchase such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the cooperative need not act in a handler capacity with respect to such milk.

When the milk of any producer is commingled in a tank truck with that of other producers, the identity of the individual producer's milk is lost. The amount of the producer's milk in the truck and the butterfat content thereof can be determinated only from measurement of the milk at the farm and from milk samples taken from the farm tank. After the milk has been pumped from the individual producer's farm tank into the tank truck of the hauler and commingled with the milk of other producers, there is no opportunity to measure, sample, or reject the milk of an individual producer.

Much of the milk received at pool plants in the Texas area is picked up at the farm in trucks owned or operated by, or under the control of, cooperative associations. In this case, it is only the association that has the opportunity to measure and sample the milk of individual producers that is received at the pool plant. In the absence of any agreement by the plant operator to be the handler for the milk, the association necessarily must be the responsible handler for the milk as it leaves the farm.

When a cooperative is the handler for farm bulk tank milk, certain accounting and payment procedures should

apply under the merged order with respect to such milk. As provided in the attached order, the milk would be considered as a receipt of producer milk by the cooperative at the location of the pool plant to which the milk is delivered. The purchase of such milk by the pool plant operator would be treated as an interhandler transfer but would be classified pro rata with producer milk that the pool plant operator may receive. The pool plant operator would be obligated to the producer settlement fund for the milk received directly from producers and by transfer from bulk tank cooperative handlers at its classified use value. The cooperative in turn would be paid from the producer-settlement fund by the market administrator at the blend price. This is in contrast to the procedure under the North Texas, Central West Texas, Austin-Waco and San Antonio orders whereby the cooperative accounts to the pool at class prices for the milk delivered to pool plants. Under the South Texas and Corpus Christi orders, the milk delivered by the cooperative is now treated as a receipt of producer milk by the plant operator, who then is obligated to the pool for such milk.

The adopted accounting and payment procedure will facilitate administration of the order with respect to matters of finacial responsibility and audit adjustments. It is the pool plant operator who processes the milk and distributes it to consumers. It is reasonable, then, that the responsibility for accounting for the utilization of such milk and for its payment be placed directly on the plant operator. Were settlement with the pool to be made by the cooperative association, i.e., should the plant operator settle with the cooperative at class prices and the cooperative pay to the producer-settlement fund, an unnecessary third party is involved in the transaction. Also, the adopted procedure will facilitate the handling of audit adjustments that might result from the verification of a plant's utilization of milk.

An error in the reported classification of milk at the pool plant, for example, would not require a related adjustment in the cooperative's classification of milk and thus its obligation to the pool for such milk.

A pool plant operator receiving farm bulk tank milk from a cooperative also should be responsible for paying to the market administrator the administrative assessment on such milk. The audit and verification activities of the market administrator relate essentially to the operations of the pool plant where the milk is processed. As in the case of producer milk which he receives from the farm, the plant operator thus should pay his pro rata share of the administrative costs on milk received from the cooperative in its capacity as a bulk tank handler.

When the cooperative assumes its role as the responsible handler on farm bulk tank milk, the pool plant operator may buy such milk on the basis of weights and butterfat tests determined at the plant rather than on the basis of those determined at the farm. Usually, the quantity of milk picked up at the farm slightly exceeds the quantity ascertained as actually received at the plant. In such cases, the difference should be considered as a receipt of producer milk by the cooperative association at the location of the pool plant where the milk in the tank truck was delivered. The cooperative should be obligated to settle with the producer settlement fund and to pay the administrative assessment on the milk involved.

The pool plant operator should be permitted under the merged order to be the responsible handler on the bulk tank milk moved by the cooperative from the farm to the plant if both the cooperative and the pool plant operator notify the market administrator that they have agreed to such a handler arrangement and that the plant operator agrees to purchase the milk on the basis of weights and

tests determined at the farm. Under this arrangement, the pool plant operator would be responsible for the milk in the same manner as for producer milk that he receives at his plant directly from the farm.

A cooperative association also should be a handler with respect to the milk of a producer which is diverted for the account of the association from a pool plant of another handler to a nonpool plant that is not a producer-handler plant. All six orders proposed to be merged provide that a cooperative may act as a handler for diverted milk. Continuation of this handling arrangement will facilitate the movement of milk not needed for fluid use to nonpool plants for manufacturing.

In its brief and exceptions, the merger proponent urged that a cooperative's designation as a handler with respect to diverted milk or farm bulk tank milk be limited only to the handling of member milk. This should not be adopted. The merged order should afford all cooperatives in the market flexibility in the arrangements under which they sell milk to pool plants or dispose of reserve supplies. If it so chooses, a cooperative should be able to pick up the milk of nonmember producers along with the milk of its members for delivery to a pool plant or for diversion to nonpool plants. This procedure will enable the cooperative to act as the marketing agent for a nonmember producer who, although he has not become a member of the cooperative, has contracted with the cooperative to act as the marketing agent for his milk. Nothing in the order would require a cooperative to pick up the milk of nonmember producers. It would provide, however, that when a cooperative does pick up milk of nonmember producers on trucks under its control it must assume varying degrees of responsibility with respect to such milk, depending on the handling arrangements made.

The Capper-Volstead Act provides the criteria by which cooperative associations are determined to be qualified cooperatives under the Agricultural Marketing Agreement Act. With the adopted handler definition, the merged order would be consistent with that provision of the Capper-Volstead Act which recognizes that cooperatives may "deal in the products of nonmembers" and which limits such dealings to amounts not greater in value than as are "handled by it for members."

At the hearing a witness for the merger proponent expressed concern regarding payments to a nonmember producer if the cooperative is marketing such producer's milk. If the nonmember producer has signed a contract with the cooperative whereby he authorizes the cooperative to market his milk and collect payment therefor, the cooperative may pay the nonmember in accordance with the contract. If such marketing functions occur in the absence of a written contract, the cooperative would be required to pay the nonmember producer not less than the prices prescribed by the order.

Producer-handler. As under five of the six orders now, the merged order should provide for the exemption of a "producer-handler" from the pooling and pricing provisions of the order. The San Antonio order does not contain a producer-handler definition.

Experience under the Texas orders has demonstrated that effective regulation can be insured without the full regulation of individuals who produce, process, and distribute milk produced on their own farm and who buy no milk from other dairy farmers. Such operations in Texas are basically self-sufficient in that they rely primarily on their own farm production and assume the burden of maintaining the necessary reserve supply of milk associated with their fluid milk operation and of dis-

posing of any daily or seasonal surpluses they may produce. Although two handlers objected in their exceptions to the failure to fully regulate producer-handlers, the record does not support the need for such regulation.

As adopted herein, a "producer-handler" would be any person who operates a dairy farm and a processing plant and who receives no fluid milk products from sources other than his own farm production and pool plants. Any such receipts from pool plants during the month could not exceed the lesser of 5 percent of his Class I disposition during the month or 10,000 pounds. A producer-handler could not dispose of any other source milk in the form of a fluid milk product except through the addition of nonfat milk solids to fortify fluid milk products received from his own farm or from pool plants. To qualify as a producer-handler, such person would have to provide proof satisfactory to the market administrator that the care and management of the dairy farm and other resources necessary for his own farm production of milk and the management and operation of the processing plant are the personal enterprise and risk of such person.

This producer-handler definition is similar to the one proposed by the merger proponent and closely parallels the producer-handler definition of the South Texas and Corpus Christi orders. Although the other orders are somewhat more liberal regarding the exemption of producer-handlers, application of the producer-handler provisions adopted herein to the merged market is not expected to change the status of any person now defined as a producer-handler under the individual orders. Under the current market situation, the adopted definition represents a reasonable set of criteria for exempting such persons from the pricing and pooling provisions of the order.

A proprietary pool plant operator proposed that there be a 12,000-pound limit on the size of a producer-handler's

fluid operation. The handler stated that when a producer-handler type operation exceeds 12,000 pounds of Class I milk per month the person involved ceases to be basically a dairy farmer and becomes instead a milk handler and should be fully regulated.

No evidence was presented to show that a producer-handler distributing more than 12,000 pounds of Class I milk monthly would be a disruptive factor in the merged market. Although the record does not indicate the size of the current producer-handler operations, presumably they are generally larger. Monthly sales of 12,000 pounds might well represent the production of no more than 8 to 10 cows. No size limitations on producer-handlers are provided now under the individual orders. A restrictive provision of this nature appears unneeded in the merged order at this time.

As an alternative to the 12,000-pound limitation on producer-handler operations, a proposal in the hearing notice would place a 1,000-pound monthly limit on purchases of fluid milk products by a producer-handler from pool plants. No testimony was presented by the proprietary handler concerning the 1,000-pound limit. Testimony by another witness, however, indicated that a currently defined producer-handler under the South Texas order would lose his status if the 1,000-pound limit were adopted. Such person would maintain his present status if the cooperative's proposed 10,000-pound limit were provided.

The individual orders now permit a producer-handler to buy milk from pool plants, although they differ somewhat as to the amount. Only the South Texas order provides a greater restriction than the 10,000-pound limit adopted herein. The record does not indicate that producer-handlers are causing disorderly marketing in the individual markets and that there is any need for the lower

limit on purchases from pool plants. Within the limits adopted herein, a producer-handler should continue to be permitted to purchase fluid milk products from pool plants without losing his producer-handler status.

As part of his alternate proposal, the proprietary handler also proposed that if a producer-handler loses his status and his plant becomes pooled, such person should not be eligible for producer-handler status until the third consecutive month in which he again would otherwise qualify as a producer-handler. The handler indicated that a producer-handler should not be permitted to switch his status back and forth between that of a producer-handler and that of a fully regulated handler to secure the benefits of whichever status might best serve his operational needs at the time.

Again, the record fails to demonstrate that such a provision is essential to the exemption being granted producer-handlers. Such persons generally have not been switching between regulated and unregulated status under the present orders. The provision urged for adoption is unnecessary at this time.

The provisions of the merged order would preclude a producer-handler from disposing of other source milk (such as nonfat dry milk) as Class I milk, except to increase the nonfat milk solids content of the fluid milk products he processes. Such provisions are necessary to assure that a producer-handler does not rely upon milk or milk products for Class I use that may be available at less than the order's Class I price. In the absence of any requirement to pay class prices for milk, a producer-handler could find it advantageous to reconstitute nonfat dry milk, for example, and sell it in fluid form to consumers. With nonfat dry milk carrying only a surplus milk value, competing regulated handlers would be at a disadvantage on their Class I sales.

It is recognized that relative to regulated handlers producer-handlers could have a very slight price advantage on fluid milk products modified by the addition of nonfat milk solids. This situation now exists in the South Texas, Corpus Christi and Austin-Waco markets. There is no indication, however, that this is a disruptive factor in these areas.

Under the merged order, producer-handler status would be contingent upon such person proving to the market administrator that the operation of the dairy farm and processing plant in question are at his sole risk. As indicated, a producer-handler's exemption from the pooling and pricing provisions is predicated upon the basic self-sufficiency of the total operation. Accordingly, no other person should be permitted to share the risk involved with the operation of a producer-handler's farm or his plant. All resources necessary for his own farm production of milk must be his personal risk. Similarly, all risk associated with the operation of the processing plant must be that of the producer-handler. The risk concept need not extend, however, to the actual distribution on routes of the milk processed by the producer-handler. A jobber, for example, might pick up packaged fluid milk products at the dock of a producer-handler's plant for delivery to retail outlets. Although the producer-handler would not be assuming the risk of distribution in this case, neither would a regulated handler operating in similar fashion with respect to fluid sales from his plant.

Producer. The term "producer" defines those dairy farmers who constitute the regular source of supply for the merged market. The producer definition provided herein, with the exception of the "dairy farmer for other markets" concept described later, follows closely the definition proposed by the proponent of the merged order.

Producer status under the merged order should be provided for any dairy farmer who produces milk approved by a duly constituted regulatory agency for disposition in the marketing area as Grade A milk and whose milk is received at a pool plant directly from the dairy farmer or received by a cooperative association as a handler on farm bulk tank milk for delivery to a pool plant. Producer status also should be accorded such a dairy farmer who has an established association with the market and whose milk is diverted to nonpool plants on occasion for surplus disposal.

A producer-handler and a governmental agency, which would have exempt status under the order, are excepted from the producer definition. In addition, the merged order should preclude the possibility of a dairy farmer being a producer under two orders with respect to the same milk. In this regard, the producer definition should continue the provisions of the present orders that exclude (1) a person with respect to milk which is diverted to a pool plant regulated under this order from a pool plant regulated under another order if such person is a producer under the other order with respect to such milk and it is allocated by agreement to Class II or Class III use under this order, and (2) a person with respect to milk which is diverted to another order plant from a pool plant regulated under this order if any portion of such person's milk is assigned to Class I milk under the other order.

The producer definition should exclude any person with respect to milk produced by him during the months of February through July that is caused to be delivered to a pool plant by a cooperative association or a pool plant operator if during the immediately preceding period of September through November any milk from the same farm was caused by such cooperative association or pool plant operator to be delivered to plants as other than producer

milk,[4] except milk diverted to a non-pool plant that loses its producer milk status. This provision should not apply, however, to dairy farmers associated with a plant that was not a pool plant during any of the preceding months of September through November but is regulated under the Texas order during any of the months of February through July. In this case, the dairy farmers delivering milk to such a plant should acquire producer status on their deliveries during the February-July period.

In connection with its proposed pooling standards for supply plants, proponent cooperative expressed concern about the possible association of unneeded milk supplies with the market during the flush production months. With this in mind, the cooperative proposed a supply plant in any of the months of automatic pooling (a time when production is usually heavy) should not exceed 150 percent of the monthly average volume of milk pooled at the plant during the period upon which such plant's automatic pool status is based (usually the period of short production). Proponent stated that such a provision is necessary to prevent the influx of dairy farmers during the flush-production period when shipping standards need not be met but when milk production exceeds the market's fluid needs by the greatest amount.

Any safeguards against the addition of unreasonable quantities of producer milk on the market should apply not only in the case of supply plants but with respect to other pool plants as well. Because of the nature of their operations, it must be assumed that it would be as easy to asso-

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4. In referring here and elsewhere in this decision to milk that is caused to be delivered to a plant by a cooperative association, it is intended that this include milk of producers which the cooperative, as the marketing agent for the milk, directs be moved from the farm to a particular plant, irrespective of whether the cooperative or some other person is the accountable handler under the order for such milk.

ciate additional milk supplies through cooperative balancing plants as it would be through supply plants. There is much less opportunity, of course, for additional milk supplies to be associated with a distributing plant since the performance requirement for such a plant is the same during the flush-production period as during other months.

Cooperative balancing plants now operating in the Texas area are manufacturing outlets not only for the six Texas markets under consideration but for neighboring markets as well. When reserve milk supplies are moved by the cooperative from various markets to the balancing plants for manufacturing, it is not uncommon for the milk to be reported as a receipt of producer milk at the plant rather than as a diversion of milk from another order. Under this arrangement, the milk, although a reserve supply for the other market, is pooled under the order regulating the balancing plant. For example, milk not needed for fluid use in the Central West Texas, Austin-Waco, San Antonio, and Corpus Christi markets, where manufacturing facilities are not available, is often moved to a South Texas balancing plant under this handling arrangement. Although the appropriateness of this arrangement for these particular markets would become moot with the merger of the six orders, the issue remains with respect to the handling of reserve milk from other neighboring markets. When milk normally associated with the Rio Grande Valley market, for instance, is not needed in that area for fluid use, it is moved at times to a North Texas balancing plant for manufacturing. Rather than moving the milk by diversion, and thereby continuing to pool the milk under the Rio Grande Valley order, the milk is reported by the cooperative as a receipt of producer milk under the North Texas order.

If a handler causes the milk of a dairy farmer to be moved to another market as other than producer milk dur-

ing the months when supplies are in greatest demand, producers regularly supplying the Texas market should not have the burden of sharing their pool proceeds with such other dairy farmers during the flush production months when the handler finds their milk to be surplus to the needs of the other market. A handler associating a dairy farmer with another market during the short-production season should not be able to have the dairy farmer qualify as a producer on the Texas market in other months when supplies are much more plentiful relative to demand. Permitting a handler to shift dairy farmers back and forth between markets in this manner would take supplies of milk away from the Texas market at a time when they are needed and then would reassociate such supplies at a time when they are not needed. This procedure would not be conducive to the orderly marketing of milk of producers regularly supplying the Texas market.

The intent of the "dairy farmer for other markets" provisions described above is to prevent a cooperative or plant operator from pooling on this market during the months of February through July milk that can be reasonably considered as a reserve supply for another market. Such provisions would not apply to a dairy farmer coming onto the market from another market if different persons were directing the delivery of the milk in each market, or to dairy farmers delivering milk to a pool plant that was a nonpool plant within the September-November period. The milk of dairy farmers that becomes associated with this market during the February-July period in this manner does not necessarily represent reserve supplies associated with another market and, accordingly, these dairy farmers should be allowed to obtain producer status under the order during this period.

Under the provisions adopted herein, milk received at a pool plant during the months of February through July

from a "dairy farmer for other markets" would be designated as other source milk and allocated to the extent possible to Class III milk. As such, this milk would be accounted for in a manner similar to receipts of fluid milk products from a producer-handler or a governmental agency plant that has non-producer status.

The application of the "dairy farmer for other markets" provisions should be modified somewhat for the initial period starting from the effective date of this order through July 1975. Otherwise, the determination of producer status under these provisions during this period would be contingent upon where a dairy farmer delivered his milk during September through November 1974, which would be before the merged order is effective. Dairy farmers thus would not have adequate notice as to the future rules concerning their eligibility as producers under the merged order. Accordingly, a dairy farmer's eligibility for producer status should be based initially on his status during the month immediately preceding the effective date of the merged order rather than during the September-November 1974 period. Since at least 30 days' notice will be given regarding the effective date of any merger, dairy farmers will be apprised in advance under this arrangement of the rules concerning producer status.

In its exceptions to the recommended decision, a cooperative urged that the "dairy farmer for other markets" provisions not be adopted. The cooperative expressed concern that it would not be able to shift producers to the Texas market during the flush production months to meet the Class I needs of handlers. Also, it was pointed out that such provisions would not preclude the addition of substantial quantities of milk to the market through the pooling of a new plant.

Past experience in the Texas area does not suggest that handlers in the market will be unable to acquire adequate milk supplies during the months of heavy production. Producers now associated with the market should be able to supply the Class I needs of the market during such months with little difficulty.

A plant would not be able to shift to the Texas market during the flush production months without having demonstrated a reasonable association with the market. This would be through distribution in the marketing area or shipments to distributing plants, which in either case would have to be sufficient to meet the pooling standards of the order. A plant meeting such standards should not be precluded from being pooled in the market.

Producer milk. The "producer milk" definition is intended to define the milk that would be priced and pooled under the merged order. The definition adopted herein carries out the basic objectives set forth by the merger proponent.

As provided herein, producer milk would include milk received during the month directly from a producer at a pool plant by the plant operator. It also would include milk of a producer that is received during the month by a cooperative association as a bulk tank handler for delivery to a pool plant. Milk picked up by a handler at the farm in a bulk tank truck but not received at a plant until the next month would be producer milk in the month in which picked up. Under the adopted provisions, producer milk also would include milk of producers that is diverted from certain pool plants under specified conditions.

Under the present accounting procedures, bulk tank milk that is picked up at the farm but not physically received at a plant until the following month is treated as

a receipt of producer milk in such following month. This procedure has presented substantial accounting problems, particularly when milk passes through a reload facility and a portion of the load on the pick-up tanker is transferred to an over-the-road tanker and received at a plant that month, while the remainder is held at the reload facility for delivery to a plant the next month. While administrative guidelines have been adopted to promote uniform accounting procedures for bulk milk throughout the Federal order system, the procedures have not fully resolved the accounting problems to the satisfaction of affected parties. Further, individual producers have not understood the deferred settlement for milk that results when milk picked up in the current month is not physically received at a plant during that month.

Dairy farmers need not be required to wait one and a half months before receiving the uniform price for milk that is picked up at their farms on the last day of a month but is not received at a plant until the following month. The accounting procedure will be simplified and should be more readily accepted if milk is pooled in all cases in the month in which it is picked up at the farm. The changes provided herein, will permit the pooling of producer milk in the month it is picked up at the farm, if the milk is received at a plant in the current or the following month. Milk received in the following month will be included in the responsible handler's end of the month inventory and will be priced at the location of the plant where the milk is physically received in the following month. Since this milk reasonably will be received at a plant on the 1st or 2nd day of the following month, the handler will know the location of the plant of actual receipt in time to include this information in his monthly report, which he files by the seventh day of the following month. If, however, none of the milk in the pick up

tanker is received at a plant such milk will not be included in the handler's report and he will have no pool obligation on it. This conforms with the present provisions which tie the producer milk provisions to its receipt at a plant.

If the operator of a pool plant is the responsible handler he will account for this producer milk as part of his end of the month inventory and will be charged the Class III price in the month it is picked up at the farm. In the following month, this milk will be treated in the same manner as other fluid milk products he had in inventory.

If a cooperative association bulk tank handler is the responsible handler such cooperative will account for the milk in transit as inventory and at the Class III price and will be credited at the blend price. Additional conforming changes are needed to implement this procedure to insure that in the following month the cooperative is credited for its pool obligation in the preceding month on such milk. In such following month, this milk is included in the obligations of the pool plant handler who physically received it and he will account to the market administrator for this milk at the classified prices. Such monies would be deposited in the producer-settlement fund, but since the milk was pooled in the preceding month it would not be included in the pool computation of the current month.

It should be noted here that bulk tank milk being diverted by a cooperative from another handler's pool plant to a nonpool plant should not be included in the cooperative's ending inventory if the milk is in transit at the end of the month. Instead, the final accounting for the milk should be in the month in which it is picked up at the farm. The inventory accounting procedure is not necessary in this case since the cooperative is the only accountable handler under the order for such milk. The milk is

received by the cooperative, of course, at the time it is picked up at the farm.

Divisions of producer milk from a pool distributing plant or a pool supply plant to a nonpool plant that is not a producer-handler plant, for the account of the handler operating the pool plant, are recognized with specified limitations. Similar diversions could be made for the account of a cooperative from the pool plant of another handler. Also, producer milk could be diverted from a pool distributing plant to a pool supply plant or a pool cooperative balancing plant for the account of the distributing plant operator.

Diversion provisions are desirable to facilitate the orderly and efficient disposition of the market's reserve milk supplies. When producer milk is not needed in the market for Class I use, its movement to nonpool plants for manufacturing without loss of producer milk status should be accommodated. It is necessary, however, to safeguard against the association with the market of unneeded milk supplies through the diversion process. Accordingly, certain limitations should apply with respect to diversions of producer milk to nonpool plants.

The order should provide that milk of a dairy farmer be physically received at a pool plant before any of his milk is eligible to be diverted as producer milk. If a dairy farmer loses his producer status under the order, his milk must be reassociated with a pool plant before it may be eligible for diversion. For transitional purposes, deliveries to pool plants under the six orders to be merged should be considered as deliveries to pool plants under the merged order. These requirements will assure that producers will have established an association with the market before their milk is eligible for diversion as producer milk to nonpool plants.

A limitation should be placed on the total quantity of producer milk that may be diverted monthly to nonpool plants by a handler. The quantity of milk so diverted by a cooperative association should not exceed one-third of the milk that it causes to be delivered during the month to all pool plants, except its pool balancing plants. Such deliveries to pool plants would include both the milk for which the cooperative is the bulk tank handler and the farm bulk tank milk for which there is an agreement that the plant operator, rather than the cooperative, will be the accountable handler.

The operator of a pool supply plant or a pool distributing plant should be able to divert any milk that is not under the control of a cooperative association. The total quantity of milk so diverted should not exceed one-third of the producer milk physically received at the handler's pool plant that was not caused to be delivered to such plant by a cooperative that is diverting producer milk.

Any milk diverted by a handler in excess of the quantity limitations should not be producer milk. If a diverting handler does not designate the producer deliveries to nonpool plants that are not producer milk, no milk diverted to nonpool plants by such handler during the month should be producer milk.

As provided herein, milk diverted from a pool plant would be included in the plant's receipts for purposes of determining whether or not the plant meets the applicable pooling standards. It is necessary under this procedure to safeguard against a pool plant not meeting the pooling standards because too much milk was diverted from the plant by a cooperative, perhaps without timely knowledge of this by the plant operator. Accordingly, whatever quantity of milk diverted by a cooperative from a pool plant of another handler that would cause such plant to

become a nonpool plant should not be considered as producer milk.

A proprietary handler proposed that he be permitted to divert milk from a pool distributing plant to a pool balancing plant operated by a cooperative association for manufacturing. Diversions between pool plants are not now permitted under the six orders. Thus, when milk is moved directly from the farm to the balancing plant for surplus disposal, such milk is treated as a receipt of producer milk at the cooperative's pool plant and is the payroll responsibility of the cooperative. The handler indicated that he would like to retain the producer milk status and the payroll responsibility for his nonmember producers when their milk is moved to the cooperative's plant in this manner. To accomplish this now, he must receive the milk at his plant and then transfer the milk to the cooperative's balancing plant.

The merged order should promote the efficient handling of milk by permitting the operator of a pool distributing plant to divert milk to a cooperative's pool balancing plant and retain the producer milk status and payroll responsibility for such milk. This will permit a distributing plant operator to avoid unnecessary and costly movements of milk merely for the purpose of retaining his status as the accountable handler of the milk. This procedure also would relieve the cooperative of accounting for this milk as its own producer milk and being responsible in all respects for the milk.

As indicated earlier, a cooperative association plant at Hillsboro, Kansas, that now qualifies as a pool balancing plant would be precluded from such status under the merged order. Under the provisions adopted herein this plant possibly could qualify as a pool supply plant. The plant has manufacturing facilities and has customarily

processed reserve milk associated with the market. In view of this situation, it is both prudent and desirable that these facilities be available to manufacture the market's reserve supplies. Accordingly, provision should be made for the diversion of milk to pool supply plants as well as pool balancing plants. This will facilitate the orderly disposition of milk on the Texas market that is not needed for fluid use.

Milk diverted from a distributing plant to a pool plant of a cooperative association should be limited to milk that is not member milk of the cooperative. This will insure the integrity of the performance standards under which supply plants and balancing plants qualify for pooling. Without this limitation, member milk that might normally be received at the cooperative's plant as producer milk could be received as milk diverted from a distributing plant. Under this arrangement, the cooperative would be able to pool more milk on the market than would otherwise be the case.

As proposed by the merger proponent, all diverted milk should be deemed for pricing purposes to have been received by the diverting handler at the location of the plant to which the milk was diverted. This comports with requirements of the Act that milk be priced at the location of the plant of actual receipt. Pricing diverted milk at the location of the plant where such milk is physically received, rather than at the city plant from which diverted, removes the possibility of subsidizing distant producers when their milk is diverted to distant manufacturing plants. This would occcur if such producers received a blend price f.o.b. the city plant as if the milk had actually moved to the city, when in fact no transportation cost had been incurred because the milk was diverted to a manufacturing plant located near the producer's farm.

Definition of a receipt. A proposal by a cooperative association and the operator of a distributing plant would incorporate in the merged order the "administrative guidelines" that are being used by the market administrators for orders in Texas and elsewhere to determine what constitutes a receipt of milk at a plant.

These guidelines cover a number of milk receiving operations involving farm-to-plant milk movements and movements between plants. Such operations include receiving milk from the farm in a bulk tank truck that is partially unloaded at the plant or to which milk is added at the plant, or receiving milk from the farm through reload stations. Also included are those cases where milk from more than one plant, or from a plant and producers, is received at a pool plant in the same tank truck, with the truck perhaps being partially unloaded at the pool plant or "topped off" with additional milk. Other receiving operations covered relate to diversions of milk from pool plants to nonpool plants that involve various handling arrangements. Proponents contended that including these guidelines in the order would insure the uniform application of these administrative rules to all handlers in the market.

The receipt guidelines now being used administratively were developed largerly to assist in a more uniform application of the orders over a wide region in the absence of any specific order provisions concerning particular milk receiving operations. The guidelines apparently have widespread acceptance within the industry and appear to be adequately serving the needs of producers and handlers in the area here under consideration.

Under the modified procedures for the pooling of producer milk in the month it is picked up at the farm, such procedures will not have the same broad application and

it would not be appropriate to include such guidelines in the order. Their exclusion from the order would provide a degree of flexibility in adapting the guidelines to changing methods of handling milk that would not be available if the guidelines were incorporated in the order. Moreover, the inclusion of the guidelines in the order would not remove the verification problems encountered in providing uniform application of the order provisions. The problems concerning the verification of a receipt of milk under the merged order would be the same whether the market administrator is enforcing an administrative guideline or an order provision. In view of the foregoing considerations, the proposal is denied.

In their exceptions regarding this issue, proponents restated their position taken at the hearing that a "receipts" definition must be included in the order to assure uniform application of the order provisions to all handlers. For the reasons just indicated, we cannot agree with proponents on this point.

(b) *Classification of milk.* The uniform classification plan recently adopted for each of the six orders under consideration should be continued under the merged order. This plan provides for the classification of milk according to use, including rules for determining the classification of milk moved from one plant to another. The plan also sets forth a procedure for allocating a handler's receipts of milk and milk products from various sources to his utilization in each class in order to determine the classification of producer milk.

At the time of the merger hearing, five of the six orders were involved in amendatory proceedings concerning proposals for a uniform classification plan for 39 orders. The South Texas order was not included. Revised recommended decisions had been issued by the Department and

were being reviewed by the industry prior to the issuance of final decisions by the Department.

In conjunction with its merger proposal, the proponent cooperative urged that the Department's recommended classification plan, with certain modifications, be carried forth under the merged order. Handlers who testified on the classification issue generally took a similar position. Because of the broad industry support for a uniform classification plan, and because of the very extensive hearings that had been held on this issue relative to the 39 orders, little testimony was presented at the Texas hearing concerning the details of the classification provisions for the merged order. As indicated at the outset of this decision, action has already been taken on the basis of this hearing with respect to the proposal for interim action on a uniform classification plan for the South Texas order.

Following the close of the merger hearing, the 39-market proceedings were completed and the resulting uniform classification plan for such markets became effective on August 1, 1974. The same classification plan was adopted for the South Texas market and it likewise became effective on that date.

There is no basis for a classification plan for the merged order different from the plan just recently found appropriate for the separate orders. The modifications of the plan, or objections to it, that were set forth by producers and handlers at the merger hearing were similarly raised by the same parties in the 39-market proceedings and were fully considered at that time. Current marketing conditions in the Texas area here under consideration support the continued applicability of the recently adopted classification provisions.

A proprietary handler urged a change in the merger proponent's proposed classification of milk that is trans-

ferred to a pool plant from another pool plant or from a cooperative bulk tank handler. Under the cooperative's proposal, the two handlers involved could agree on the classification of the milk transferred if there is enough utilization in that class at the transferee-plant. In the absence of any agreement, a Class I classification would apply to the transfer. This is the arrangement adopted herein for the merged order with respect to transfers between pool plants. As described earlier, however, milk received at a pool plant from a cooperative bulk tank handler would be classified in the same manner as producer milk received at the pool plant. This method of classifying cooperative bulk tank milk was the objective sought by the handler in his proposal.

It should be noted here that although handlers would be able to agree on the classification of transfers as between pool plants such transfers would be subject, nevertheless, to the location adjustment, credit provisions of the order. These provisions limit the amount of location adjustment credit that may be permitted on Class I transfers between pool plants. As described later, this is necessary to protect the pool from unwarranted transportation costs.

(c) *Class I price and in-area location adjustments.* The Class I price for the Texas market should be established for the Dallas area, or "Zone 1," with prices applicable at plants in other areas to be determined through the use of location adjustments. Such Class I price should be the basic formula price for the second preceding month plus a Class I differential of $2.32.

For purposes of applying location adjustments, the Texas marketing area should be divided into 12 pricing zones. The location adjustment for each zone, the resulting Class I differential (shown parenthetically), and the Texas counties that should be included in each zone are as follows:

Zone 1—no adjustment ($2.32).

Camp.
Collin.
Cooke.
Dallas.
Delta.
Denton.
Ellis.
Fannin.
Franklin.
Grayson.
Hill (Blum and Itasca divisions only).[5]
Hood.
Hopkins.
Hunt.
Johnson.
Kaufman.
Lamar.
Morris.
Parker.
Rains.
Red River.
Rockwall.
Somervell.
Tarrant.
Titus.
Upshur.
Van Zandt.
Wise.
Wood.

Zone 2—plus 6 cents ($2.38).

Gregg.
Harrison.
Marion.
Panola.
Rusk.
Smith.

Zone 3—plus 15 cents ($2.47).

Anderson.
Bell.
Bosque.
Cherokee.
Comanche.
Coryell.
Erath.
Henderson.
Hill (except Blum and Itasca divisions).
Lampasas.
Limestone.
McLennan.

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5. The use of "divisions" for delineating portions of Hill County is based on the geographical units set forth in the publication of the Bureau of Census, U.S. Department of Commerce, titled "Number of Inhabitants, TEXAS, 1970 Census of Population."

Falls.
Freestone.
Hamilton.
Mills.
Navarro.

Zone 4—plus 18 cents ($2.50).

Angelina.
Houston.
Jasper.
Leon.
Nacogdoches.
Newton.
Polk.
Sabine.
San Augustine.
Shelby.
Trinity.
Tyler.

Zone 5—plus 20 cents ($2.52).

Brazos.
Burleson.
Grimes.
Madison.
Milam.
Robertson.
Walker.

Zone 6—plus 25 cents ($2.57).

Andrews.
Borden.
Brown.
Callahan.
Coke.
Coleman.
Dawson.
Eastland.
Ector.
Fisher.
Foard.
Glasscock.
Haskell.
Howard.
Jack.
Jones.
Kent.
King.
Knox.
Martin.
Midland.
Mitchell.
Nolan.
Palo Pinto.
Runnels.
Scurry.
Shackelford.
Stephens.
Sterling.
Stonewall.
Taylor.
Throckmorton.
Tom Green.
Young.

Zone 7—plus 30 cents ($2.62).

Bastrop.
Burnet.
Lee.
Travis.
Williamson.

Zone 8—plus 36 cents ($2.68).

Austin.
Brazoria.
Chambers.
Colorado.
Fayette.
Fort Bend.
Galveston.
Hardin.
Harris.
Jefferson.
Liberty.
Montgomery.
Orange.
San Jacinto.
Waller.
Washington.

Zone 9—plus 42 cents ($2.74).

Bexar.
Caldwell.
Comal.
De Witt.
Gonzales.
Guadalupe.
Hays.
Jackson.
Lavaca.
Matagorda.
Wharton.
Wilson.

Zone 10—plus 53 cents ($2.85).

Aransas.
Bee.
Calhoun.
Goliad.
Karnes.
Live Oak.
Refugio.
Victoria.

Zone 11—plus 66 cents ($2.98).

Brooks.
Duval.
Jim Wells.
Kenedy.
Kleberg.
Nueces.
San Patricio.

Zone 12—plus 75 cents ($3.07).

Cameron. Willacy.
Hidalgo.

The cooperative proposing the merged order proposed that the basic formula price now used under the separate orders be continued. There was no opposition to this proposal.

The present basic formula price in each of the separate orders is based on pay prices for manufacturing grade milk at plants in the States of Minnesota and Wisconsin. This basic formula price is used in setting Class I prices under all Federal orders. Its continued use under the merged order will assist in the maintenance of adequate supplies for the market. Also, Class I price changes under this order will remain coordinated with those under all other orders.

The cooperative also proposed that the Class I price for the Texas market be established for the Dallas area, with prices applicable at plants in other areas to be determined through the use of location adjustments. Under its proposal as discussed at the hearing, the Class I price at Dallas would be the basic formula price for the second preceding month plus $2.34, two cents above the present Dallas price. Class I prices at other plant locations in Texas likewise would be increased two cents over present levels. Under the hearing proposal, the present price relationships between plants located in Texas, with one exception, would be continued. At Gonzales, the Class I price would be increased six cents relative to the proposed prices at other plants.

In its exceptions to the recommended decision, the cooperative modified its initial position on prices at two locations. The cooperative urged that the Class I price at Lufkin, Texas, be the same as the Class I price at Tyler and

Marshall, Texas. The price at Lufkin is now 12 cents per hundredweight higher. Similarly, the cooperative urged that the price at Victoria, Texas, be the same as the Class I price at San Antonio. The Victoria price is now 11 cents higher. In both cases, the cooperative contended that the fluid sales competition of plants at the higher-priced locations with nearby plants in the lower-priced areas is such as to warrant the same Class I price among competing handlers.

In its post-hearing brief, the cooperative also changed its initial position expressed at the hearing with respect to the general price level for the entire market. The cooperative urged in its brief that the Class I price differential at Dallas be $2.90 rather than $2.34. This was based on the Class I price applicable under the Chicago Regional order at Eau Claire, Wisconsin, plus two cents per hundredweight for each 10 miles from Eau Claire to Dallas. The cooperative likewise urged corresponding increases in Class I prices at other Texas locations to reflect the two-cent transportation rate.

A similar transportation rate (2.2 cents per 10 miles) was proposed also by a handler who operates a distributing plant at Dallas. Under this proposal, attention was directed primarily to the price relationships between Dallas and other locations throughout Texas. The handler indicated that he was particularly interested in increasing the price level at Houston relative to Dallas because of his shipments of packaged fluid milk products to Houston from his Dallas plant. He claimed that the present difference in Class I prices at these two locations does not cover his transportation cost. He stated that because of higher transportation costs today the commonly used transportation rate of 1.5 cents per 10 miles is no longer appropriate in setting prices at various locations. Under his proposal, the

Class I price at Houston, for example, would be increased 16.6 cents. The price at Harlingen would be increased 35 cents.

Another proposal that would affect the general Class I price level of the Texas market was made by a handler who operates a distributing plant at Victoria, Texas. He proposed that the transportation rate be determined from a formula, which presently would yield a rate of 1.7649 cents per 10 miles. It was suggested that the Texas price structure be tied to some pricing point in the more northern states, such as Omaha, Nebraska.

Two handlers opposed any increase in the general Class I price level. Such an increase, it was indicated, would alter adversely the price alignment with other Federal order markets. One of the handlers testified, however, that if prices in some parts of Texas are reduced, as several handlers proposed, the Class I price level should then be increased so that producers in total do not have their returns lowered.

Several proposals were made to change the present Class I prices at selected locations within the proposed marketing area. These proposals, which are less directly related to the general price level for the market, are discussed later.

Basically, the Class I price structure for the Texas market should be established at a level which, in conjunction with the Class II and Class III prices, will result in returns to producers sufficient to insure an adequate, but not excessive, supply of pure and wholesome milk for the market. The adequacy of milk supplies for the Texas area has been dependent upon the Class I prices applicable in the various segments of the adopted marketing area. The Class I price levels now applicable within this area, as

expressed in terms of the Class I differentials of the separate orders, are as follows:

North Texas	$2.32
Central West Texas	2.57
South Texas	2.68
Austin-Waco	2.70
San Antonio	2.74
Corpus Christi	3.07

Data for the separately regulated areas indicate that on a combined basis producer receipts in 1972 were 133 percent of the total Class I utilization of regulated handlers. For 1973, this figure was 129 percent. In the short production months of September, October and November, supplies were still reasonably sufficient for the Class I needs of the area. In 1972 and 1973, producer receipts during this three-month period were 117 percent and 121 percent, respectively, of Class I use.

This supply-demand relationship indicates that the prevailing Federal order Class I price structure in the Texas area has been bringing forth an adequate, although not excessive, supply of milk for consumers. A higher minimum price level under the order could stimulate additional milk production not needed for fluid use, thereby resulting in a misallocation of agricultural resources. Also, such greater production could lead to the building of costly additional manufacturing facilities since the pr ent surplus disposal capacity in Texas is now relatively limited. Moreover, since raw milk costs are customarily passed on to consumers, a higher Class I price level could lead to higher retail prices for milk. Under these circumstances, the public interest would not be served by establishing a higher minimum Class I price level than now exists in the Texas area.

In addition, an increase in the present Class I price structure for the area, such as using a Class I differential of $2.90 at Dallas with corresponding increases elsewhere in the market, could be disruptive for those producers who are regular suppliers of milk for the Texas market. Class I milk should be priced competitively with milk supplies in surrounding markets if local producers are to be reasonably assured of a Class I outlet for their milk. Thus, Class I prices within the Texas area should not be higher than the cost of obtaining quality milk on a regular basis from alternative sources. If a significant price advantage exists, handlers customarily relying on local supplies would recognize the advantage of another supply and would be encouraged to change their buying arrangements. Relatively high Class I prices in the Texas market not only could encourage the use of alternative raw milk supplies but also might cause Texas handlers to lose packaged fluid milk sales to handlers in other markets.

It is essential, then, that the Class I price structure in Texas be aligned with the Class I prices of markets that are likely to represent alternative sources of milk for the Texas area. Milk brought into Texas must come from farms and plants inspected by Texas authorities. Out-of-State supplies now approved for Texas are limited essentially to those in Oklahoma and Kansas. Minimal quantities of milk produced in Nebraska and Arkansas also are now eligible for delivery to Texas. However, should the Texas price structure provide the incentive, it could be expected that Texas handlers would develop new Texas-approved supplies in other areas.

Historically, the Chicago milkshed has been a major source of supplemental supplies for many of the markets throughout much of the United States. The cooperative proposing the merged order indicated, for example, that

during the short production months it sometimes must move Texas-approved milk normally going to Oklahoma handlers to Texas handlers instead. When it does this, it then replaces the Oklahoma milk with milk from the Upper Midwest that does not have Texas inspection.

To reflect the variable cost of moving milk from the Upper Midwest to distant markets, Class I prices in Federal order markets gradually increase the more distant the markets are from the Chicago area. This accounts for the graduated price levels not only in the markets to the north of Texas but in the now separately regulated markets within the area under consideration as well. The gradation of prices reflects to a large degree a transportation rate of 1.5 cents per hundredweight per 10 miles. On this basis, the present Class I price structure within the Texas area, including a Class I differential of $2.32 at Dallas, is in reasonable alignment with markets to the north.

The existing Class I price structure for the Texas area appears to be providing the proper balance between adequate milk supplies and the necessary alignment of prices not only with other markets but among the various segments of the Texas area. In this circumstance, this price structure should be continued under the merged order.

The handler proposing a price structure based on a location adjustment rate of 2.2 cents per 10 miles claimed in his exceptions to the recommended decision that the adopted pricing, which largely reflects a 1.5-cent rate, fails to recognize an increase in the cost of hauling milk. The handler contended that the uniformity of prices to all handlers, as prescribed by the Act, cannot be achieved unless the differences in Class I prices at various locations in the market reflect the actual costs of transporting milk. He further stressed that a failure to reflect such costs in

the Texas price structure would discriminate against him in that this would create an artificial barrier to effective competition for packaged milk sales in distant parts of the market. It was his contention, for example, that the present 36-cent difference in Class I prices at Dallas and Houston, which would be continued, does not cover the cost of moving packaged milk from his Dallas processing plant to sales outlets in the Houston area. The handler claimed that the cost of raw milk to Houston handlers f.o.b. their plants is thus less than the cost of his milk after it has been processed at Dallas and moved to the Houston area.

The Class I price structure under the Texas order is not intended to assure each handler in the market that he will have cost compatibility at any location at which he may choose to distribute milk. Its purpose is to assure handlers, and ultimately consumers, of an adequate milk supply. There has been a reasonable demonstration that the present pattern of milk prices throughout the Texas area has attracted sufficient, but not excessive, raw milk supplies to handlers operating in the various parts of the State. Local considerations do suggest certain price changes at specific locations, and these have been dealt with in this decision. Nevertheless, the supply-demand balance in the market does not warrant a major restructuring of prices that necessarily would result if prices were to reflect a higher transportation rate.

There is little doubt from the record that there has been some increase recently in the cost of hauling milk. However, to the extent that hauling costs are an important consideration in establishing the level of prices, only those costs associated with the movement of bulk milk should be considered. The price structure is intended to attract raw milk supplies to a given location, not packaged milk.

The only substantive cost data made available at the hearing were those relating to movements of milk in packaged form. These were offered by the handler proposing the 2.2-cent location adjustment rate. Although some of the increased costs would affect the movement of bulk milk as well, no extensive cost data were presented with regard to the actual current trucking costs for movements of milk in bulk form. The handler presenting the cost data for packaged milk movements also offered his analysis of how these costs would translate into the cost of hauling bulk milk. The analysis was based on a Department study that used 1969 cost data in developing synthetic costs of hauling bulk milk over long distances. The handler updated this study using various economic indices. Although a synthetic cost study may be useful as a guide, it must be recognized that the hauling costs presented in the study are constructed, or estimated, costs and not costs actually incurred by specific milk haulers. Changes in transportation allowances under an order should reflect widespread current operating experience in the market.

In spite of some increase in hauling costs, adequate raw milk supplies are in fact being made available to handlers throughout the Texas market. This includes substantial movements of milk from the northern part of Texas to the southern areas of the State. There is no indication that increased hauling costs are deterring such milk movements. It is reasonable, then, to have the Class I price structure for the Texas market continue to reflect a transportation rate of 1.5 cents per hundredweight for each 10 miles. Accordingly, pricing considerations for specific areas in the market, as discussed later, are dealt with within this framework.

Contrary to the exceptor's contentions, price uniformity for all handlers in a market does not contemplate a "pre-

cise" alignment of prices (or in effect raw milk costs) at different locations based on actual hauling costs. In fact, this is something that simply cannot be achieved. The cost of transporting milk differs from hauler to hauler (as well as between bulk milk and packaged milk if recognition were to be given, as desired by exceptor, to packaged milk movements). Any reflection of hauling rates in an order could be no more than a reflection of the average hauling rate being experienced by all handlers in the market. This in itself precludes any precise price alignment for individual handlers. Also, it is not possible to establish a price structure under which each plant's Class I price is lower, and at the same transportation rate, than the price at every other plant in the market. Such an arrangement is administratively unworkable in that it would require multiple Class I prices at each plant location.

A handler may distribute milk in any area he chooses. Should he decide to sell milk in an area where handlers have a lower cost, he must assume any competitive risks involved. It would be uneconomic to have the order provide a handler with cost comparability at any location at which he may choose to distribute milk.

Only one Class I price should be announced under the order. Presently, of course, a Class I price is announced for each of the six regulated areas to be combined. Because the adopted marketing area would cover such a large territory, it is necessary that the announced Class I price apply only to a limited portion of such area. The Class I price at all plants located outside this area, defined herein as Zone 1, should be the announced Class I price as adjusted for the location of the plant.

Zone 1 should comprise much of the present North Texas marketing area. The North Texas area is the largest segment of the combined market in terms of both milk

supplies and Class I sales. Of the total Texas production now associated with the six-market area, about one-half comes from farms located in the 28 counties that would make up Zone 1. Of the total Class I sales in the six markets to the Class I sales in the six markets, about 40 percent is by North Texas handlers. Zone 1, which includes the Dallas-Ft. Worth metropolitan complex, has about 30 percent of the total population of the proposed Texas marketing area. The concentration of production and Class I sales in the present North Texas area, relative to other segments of the market, makes it appropriate to establish this area as the focal pricing point within the Texas market.

As indicated, the Class I price structure now applicable in the Texas area should be retained. With one exception, this should be the case with respect to all locations within the adopted marketing area where there are now plants regulated under the separate orders. Under this price structure, Class I prices at the various plants increase as one goes westward and southward from the North Texas area. This gradation of prices reflects the additional value that milk has at the various plant locations relative to the value of milk in the North Texas region.

Handlers in the western and southern parts of the State rely to the extent possible on locally produced milk. When local supplies are not adequate, though, as is usually the case during the short production months, additional milk must be obtained from other areas. As just noted, much of the milk supply for Texas is produced in the North Texas region. Producers in the northern area cannot be expected, however, to make their milk available to handlers in the deficit production areas unless there is a sufficient price incentive. This is related largely to the cost of moving milk.

The Class I prices that now apply at various plants in the adopted marketing area thus represent the value of an economic service to handlers by distant producers who bear the cost of moving their milk to the handlers' plants. This is the case even where a handler draws his entire supply from producers located near his plant. In the absence of any local supply, the handler would have to procure milk from others areas. Thus, the value of milk at that plant location necessarily must reflect the cost of obtaining milk from reserve supply sources. Also, the economic value of the local milk supply at a given plant location is related to the local producers' opportunity to ship milk to other plants where the price is higher. If the local price is too low relative to this "opportunity" price at other locations, the local supply will be attracted to other areas.

The only change that should be made in the Class I prices now applicable at regulated plants in Texas is a six-cent increase in the price at Gonzales. A plant at this location is now regulated under the South Texas order and has the same Class I differential ($2.68) as plants in Houston. As a result of this decision, the Class I differential at the Gonzales plant would be increased to $2.74, which is the Class I differential now applicable at San Antonio.

Although the Gonzales plant is regulated under the South Texas order, it is actually located much nearer the San Antonio market than the major sales area of the South Texas market. Gonzales is 70 miles east of San Antonio and 140 miles west of Houston. It is about 14 miles south of the main highway that connects these two cities. Also, Gonzales is located about the same distance as San Antonio from the heavy production area in the North Texas area, which is somewhat further from such area than Houston. Thus, producers delivering milk to the Gonzales plant are providing an economic service of benefit to the

handler that approximates the service provided to San Antonio handlers but which exceeds the economic service to Houston handlers. The producers delivering to the Gonzales plant should be compensated accordingly for this service.

Moreover, the higher price differential at Gonzales will more closely reflect the actual location value of milk at Gonzales relative to the value of milk at a regulated plant at Victoria, Texas. Victoria is 60 miles south of Gonzales. The present difference in Class I prices at the two locations is 17 cents. This decision will reduce the price difference to 11 cents.

Because the plants have been regulated under different orders, it has not been possible to maintain a precise alignment of Class I prices at plants located in San Antonio and Gonzales. Under the present price structure, the Gonzales handler, although paying a lower Class I price than is proposed herein, apparently has been able to maintain his milk supply. This will not necessarily be the case under the merged order, however, since his producers, over time, will seek their most remunerative outlet.

Although he did not testify at the hearing with respect to the cooperative's proposed Class I price increase at Gonzales, the operator of the Gonzales plant filed exceptions to the recommended adoption of this proposal. The handler claimed that since he has always been associated with the South Texas market his Class I price should continue to be the same as the price applicable at Houston. It is concluded, however, that on the basis of the available evidence placed in the record, and for the reasons already set forth, the adoption of the higher price at Gonzales is reasonable under the present marketing situation.

The Victoria handler who proposed that the transportation rate be determinued by a formula contended

that his Class I price is too high relative to Class I prices in Austin, Houston and San Antonio when such prices are based on the cost of hauling milk from Dallas. As an alternative to his proposal using a location adjustment formula, the handler proposed that the present Class I price applicable at his plant be reduced 9 cents. He stated that about 70 percent of his milk supply comes directly from Texas producers, with the remainder coming from a plant in Kansas.

In determining the appropriate Class I price at Victoria, it is necessary to give substantial consideration to the relationship of prices at various locations in the southern part of Texas. Although the major supply of reserve milk is in the North Texas area, which suggests the need for aligning prices with that area, distributing plants in southern Texas procure milk regularly from farms in this southern area. The economic value of milk to the southern producer is determined by the alternative outlets for his milk. If this value is not properly reflected in the Class I price at various locations, the milk, over time, probably would not be available to plants at those locations.

Corpus Christi is a major consumption center in southern Texas. The primary milkshed for this metropolitan area extends northward to an area between San Antonio and Victoria. Part of the milk received by Corpus Christi handlers comes directly from farms in this part of the milkshed and at times from a supply plant in San Antonio. The relationship of Class I prices at plants located in or near this milkshed area with the Corpus Christi price is thus an important consideration.

Based on the transportation rate of 1.5 cents per 10 miles, the present Class I prices at both Victoria and San Antonio are in reasonable alignment with the Corpus Christi price. The 93-mile distance from Victoria to Corpus

Christi would suggest a price difference of 14 cents per hundredweight. The present difference is 13 cents. Similarly, the 145-mile distance between San Antonio and Corpus Christi would suggest a price difference between these locations of 22 cents. The Class I prices at these cities now differ by 24 cents. Corpus Christi is 390 miles from Dallas. This distance would suggest a Class I price at Corpus Christi 7.5 cents lower than the currently applicable price. As noted, however, supplemental milk for handlers at Corpus Christi is obtained from the San Antonio area. In recognition of this, the present price relationship between Corpus Christi and San Antonio which reflects the 1.5-cent rate, should be maintained. Correspondingly, the current price difference between Corpus Christi and Victoria likewise should be continued.

In his exceptions to the proposed retention of his present Class I price, the Victoria handler stressed that a proper price alignment with Dallas is essential to his competitive position for fluid sales. He contended that without such an alignment he is disadvantaged in competing with distributing plants located in areas north of him.

At the hearing, the handler indicated that his sales area overlaps with those of handlers at San Antonio, Gonzales, Bryan and Houston, as well as Corpus Christi to the south. Using the 1.5-cent transportation rate as a measure of alignment, the present Class I price at Victoria is closely aligned with the prices adopted herein for Houston and Gonzales. With respect to San Antonio, the Victoria price is about seven cents lower than the distance between the two locations would suggest. Relative to Bryan, which is 154 miles to the north, just the reverse is true, with the Victoria price being somewhat high. Of course, handlers who distribute milk in lower-priced areas (usually to the north) cannot expect to compete on the same cost basis

with handlers located in such areas who have lower procurement costs.

For the above reasons, it is concluded that the proposals of the Victoria handler must be denied.

The operator of distributing plants at Corpus Christi and Harlingen that are regulated under the Corpus Christi order proposed that the price applicable at Corpus Christi apply in all the territory constituting the present Corpus Christi marketing area. In support of his proposal, proponent suggested that since consumers in the southernmost part of the merged marketing area have a relatively low effective median cash income per household, the Class I price in this region should be lower relative to Class I prices in other parts of the marketing area.

Presently, the Class I price at Harlingen is 9 cents higher than the price at Corpus Christi. Under the price structure adopted herein, this price difference would be continued. Harlingen is one of several cities located at the southern tip of Texas in an area commonly referred to as the "Valley." There are three pool distributing plants located in the Valley, at Donna, Edinburg and Harlingen. Some of the milk supplies for these handlers comes from a supply plant located at Falfurrias, which is about 65 miles north of Edinburg, the closest of the three cities. Falfurrias is located in the center of a production area that supplies milk to handlers located both in Corpus Christi and in the Valley, either directly from the farm or through the Falfurrias plant. The 9-cent higher price in the Valley relative to the price in Falfurrias and Corpus Christi provides an appropriate price to producers in this production area who have a choice of outlets and reflects the cost of transporting milk from the Falfurrias area to the Valley. It is appropriate that this pricing structure, which is resulting in adequate but not excessive supplies of milk in the Valley, be continued under the merged order.

The operator of a pool distributing plant at Tyler proposed that the location adjustment applicable at the cities of Marshall and Tyler be minus 3 cents. This would reduce the Class I price in the Marshall-Tyler area 9 cents from the present level. Another handler who operates pool distributing plants in both Marshall and Tyler proposed a price adjustment of minus 6 cents for this area, which would reduce the present price 12 cents. The operator of a pool distributing plant in Lufkin proposed that the Lufkin price be the same as the price applicable at Marshall and Tyler. Presently, the price at Lufkin is 12 cents higher than the price at these two cities.

The plants located in these three cities distribute milk throughout the east Texas area in competition with one another and with handlers located in the Dallas-Fort Worth area and in the Houston-Beaumont area. Marshall and Tyler are located about 55 miles apart in an east-west direction. Lufkin is located to the south about 100 miles from Marshall and 85 miles from Tyler. Milk packaged at one of the Tyler plants and at Lufkin is distributed as far south as the Beaumont area and the territory just east and north of Houston. The cities of Lufkin, Tyler and Marshall are 120, 200 and 220 miles, respectively north of Houston and 105, 190 and 200 miles, respectively north of Beaumont.

The location value of milk in this entire general area of eastern Texas depends principally upon the price obtainable for milk delivered to the Houston-Beaumont metropolitan area less cost of delivery. The Houston-Beaumont area is a major consumption center for milk. Milk supplies in and around this area however, are relatively short and much of the milk for handlers must come from the heavy production region in northeastern Texas. The use of a plus 6-cent location adjustment at Marshall and

Tyler and a plus 18-cent adjustment at Lufkin reflects the gradation of Class I prices from north to south that is necessary to reflect the cost of moving milk to these intervening locations. Without this alignment of prices from north to south, handlers in the Houston-Beaumont complex would be a preferential outlet for milk produced both in the northeastern Texas region and near the cities just mentioned.

In his exceptions to the recommended decision, the Lufkin handler objected to the retention of the present price difference between Lufkin and the Tyler-Marshall area. Although recognizing the general need under Federal orders for increasingly higher prices from north to south, the handler claimed that special consideration should be given to the competitive situation existing in the Tyler-Marshall-Lufkin area. It was his position that this area is a common marketing area for plants located in these cities and that this warrants the same Class I price at all three locations.

As indicated, Lufkin is located roughly half way between the Tyler-Marshall area and the Beaumont-Houston area, with such areas being some 200 miles apart. For the reasons already noted, the price structure adopted herein is necessary to recognize the distances between plants to which milk is delivered by producers located throughout the eastern portion of Texas and the differing values that attach to milk at each location.

One of the handlers operating a distributing plant at Tyler likewise opposed the price structure that was recommended for the eastern Texas area. He contended in his exceptions that the present Houston Class I price is 10 cents too high relative to the Dallas price. This, he claimed, results in prices at Tyler and Texarkana that are too high relative to Dallas since prices at these locations are based on the Houston price.

The present Dallas-Houston price relationship—which reflects a price difference of 1.5 cents per 10 miles—was not contested at the merger hearing by the handler and the basis or need for a lesser price difference between Dallas and Houston was not explored. The 36-cent price difference for these two cities was established in December 1970 following a careful review of the then existing price relationship. The record of the current proceeding does not indicate in any way that the 36-cent price difference is now inappropriate and resulting in disorderly marketing conditions. The present Dallas-Houston price relationship should be continued.

A handler who operates a pool distributing plant at Abilene proposed that the Abilene Class I price be reduced 10 cents. The handler stated that this would improve the price alignment between Abilene handlers and competing handlers who have lower Class I prices. This proposal was supported by the operator of the other distributing plant in Abilene but was opposed by the cooperative association supplying these handlers.

Abilene, which is located 185 and 150 miles, respectively, west of Dallas and Fort Worth, has a 25-cent higher Class I price than plants at these two locations. This location value of milk at Abilene is reasonable relative to the value of milk at Dallas and Fort Worth. The handlers who operate the distributing plants in Abilene also operate distributing plants in the Dallas-Fort Worth area. Although these handlers complained that the 25-cent higher price in Abilene gives Dallas-Fort Worth handlers a competitive advantage, neither one of these handlers has started serving his fluid milk sales in the central west portion of the Texas marketing area from plants in the Dallas-Fort Worth area. Presumably, this is because there would be little or no price advantage under this arrangement.

Lowering the price of milk at Abilene by 10 cents per hundredweight also could jeopardize the milk supplies of these two plants because many of the dairy farmers delivering to the Abilene plants would have higher-valued alternative outlets for their milk. A majority of the Texas producers who deliver milk to handlers regulated under the present Central West Texas order are located in the eastern segment of that market. Handlers located in San Antonio also receive substantial quantities of milk from dairy farmers in this same region. Producers located in Brown, Comanche, Erath and Hamilton Counties represent about 30 percent of all the producers delivering to Central West Texas handlers and 20 percent of all the producers delivering to San Antonio handlers.

Until recently, a supply plant under the Central West Texas order was located at Dublin, which is in Erath County. Dublin is about 95 miles east of Abilene and 210 miles north of San Antonio. The price in San Antonio is 17 cents higher than the price in Abilene. Any lowering of the price in Abilene relative to the price in San Antonio would provide producers in these four counties that presently are delivering to Abilene with a more attractive alternative market.

The Class I prices now applicable at the plants regulated under the separate orders result, of course, from the various pricing provisions of these orders, including the location adjustment provisions. Having concluded that such price levels should be retained under the merger, it is necessary to integrate the order prices prevailing throughout the adopted marketing area into a single pricing scheme that retains the current interplant price relationships. Also, it is necessary to establish a Class I price for all locations in the marketing area even though plants are not now located there.

The most feasible method of doing this is the establishment of 12 pricing zones within the combined marketing area. Each zone would contain only those regulated plants, except for the Gonzales plant, that now have the same Class I price. In addition to the county or counties in which such plants are located, each zone also would include those additional counties that might reasonably be considered a part of the pricing zone even though no plant is now located there. The counties to be included in each zone were set forth at the outset of this discussion on the Class I price.

The counties in each zone differ somewhat from those that were proposed by the merger proponent. Since the differences occur only with respect to those counties in which there are no pool plants, they would have no impact upon regulated handlers. There is, however, an unregulated manufacturing plant at Navasota (Grimes County, which is in the South Texas marketing area) that would be in a lower price zone than that proposed by the cooperative. To the extent that producer milk is diverted to this manufacturing plant, such milk would be priced 16 cents less per hundredweight than would be the case under the cooperative's proposal. However, the adopted price for this plant corresponds very closely to the present South Texas Class I price at Navasota.

The price zones adopted herein reflect several considerations. In most cases, the present distributing plants that would be in each zone are located in or near major populated areas. Should new plants be located in any of the counties surrounding such a populated area, they would be expected to have a major part of their distribution in such area in competition with now existing plants. Each price zone, then, should encompass those plants that are, or would be expected to be, in substantial com-

petition with each other so that the plants will be subject to the same Class I price. Because the distance between such plants will be relatively limited, the value of milk delivered to such plants by producers should be the same throughout the price zone. The cooperative's proposed zone structure tended to differ from this concept in that the location of existing plants would be in many cases at the edge of a zone rather than at the center of it.

The price zones should tend to be somewhat elongated in an east-west direction, with price differences between neighboring zones limited to reasonably moderate amounts. This is necessary to have the price which is applicable throughout the zone properly related to the value which milk has at various locations within the zone. Some modification of the cooperative's proposal is necessary to carry out this concept, also.

Out-of-area location adjustments. Provision should be made also for location adjustments at plants located outside the Texas marketing area. The Class I price at plants located outside the area but in Texas and most of Oklahoma should be adjusted for location on a zone pricing basis but related to Class I prices under Federal orders applicable in those areas. At most other out-of-area plants, a minus location adjustment should apply to Class I milk at the rate of 1.5 cents per hundredweight for each 10 miles or fraction thereof that such plant is located from the Dallas City Hall, based on the shortest hard-surfaced highway distance as determined by the market administrator. No location adjustments should apply, however, at plants in Louisiana, New Mexico, or El Paso County, Texas.

The cooperative proposing the merger indicated that no price adjustment should apply at plants located in the States of Louisiana and New Mexico, in the Texas counties of El Paso and Hudspeth, and within 70 miles of Dallas.

At plants beyond 70 miles that are outside these areas, the cooperative would apply a rate of minus 1.5 cents for each 10 miles or fraction thereof that such plant is located in excess of 70 miles from Dallas. At a plant located in Oklahoma, however, the cooperative proposed that the Class I price under the Texas order, as adjusted for location, should be not less than the Class I price under the Oklahoma Metropolitan order at such location.

In the 48 Texas counties that the cooperative proposed be included in the marketing area but which are excluded under this decision, the location adjustments under the cooperative's proposal, except for Bowie and Cass Counties, would approximate those adopted herein for such counties. The cooperative would apply no adjustment in Cass County. Bowie County and the City of Texarkana, Arkansas, would be in a minus 18-cent zone under the cooperative's proposal.

The proposal of a South Texas handler would establish somewhat different location adjustments for plants located outside the marketing area. Under this proposal, the Class I price would be reduced by 2.2 cents per hundredweight for each 10 miles or fraction thereof in excess of 70 miles that the plant is located from Dallas.

At a plant located in any of the southwestern Texas counties that are outside a Federal order marketing area, the Class I price should be the Class I price applicable at Midland, San Angelo, San Antonio or Corpus Christi, Texas, whichever city is nearest to the plant. This group of counties is surrounded on the north and east almost entirely by the adopted Texas marketing area and on the south and west by the Mexico-United States border. The area is very sparsely populated and generally not conducive to the production of milk. Although it is unlikely that a pool plant would be located in this area, an ap-

propriate Class I price nevertheless should be established for these counties. Any distributing plant located in one of these counties probably would have to compete with regulated handlers in the nearest of these cities for a supply of milk. Thus, the minimum price necessary at such a plant to attract an adequate supply of milk would be the price applicable at the nearest of these four cities.

A minus 9-cent location adjustment should apply at plants in and around Texarkana, Texas-Arkansas. This price zone should include Bowie and Cass Counties, Texas and Little River and Miller Counties, Arkansas. This four-county area, which includes the City of Texarkana, is adjacent to the northeastern corner of the adopted marketing area. Two partially regulated distributing plants at Texarkana presently distribute some milk in that part of the marketing area.

If the Texarkana plants should become regulated under this order, a Class I price 9 cents below the Dallas price would be necessary to reflect the value of milk at this location. Texarkana is about 70 miles north of Marshall, 120 miles northeast of Tyler and 300 miles north of Houston. The Class I price at Texarkana would be 15 cents less than the price at Marshall and Tyler and 45 cents less than the price at Houston. As set forth previously, prices at plants in this East Texas area must reflect the location value of milk at various locations relative to the price of milk in Houston. The price differences adopted herein reflect the increasingly higher Class I prices from north to south that are necessary to obtain an adequate supply of milk at various locations in the eastern part of Texas. These price differences should maintain a reasonable price alignment among distributing plants in the Texarkana area and at Marshall, Tyler and Houston and intermediate locations.

In establishing the Class I price levels for other out-of-area locations, recognition should be given to the prevailing price levels established for certain nearby federally-regulated markets. The orders involved include the Texas Panhandle, Lubbock-Plainview, Red River Valley and Oklahoma Metropolitan orders. As past experience has shown, distributing plants located in nearby markets can develop sufficient Class I sales in the Texas area to become regulated under the Texas order. It is appropriate, then, that the Texas order recognizes the location value of milk at these plants.

The Class I prices established under the various orders just listed have been determined through the hearing procedure to be the minimum price necessary to attract an adequate supply of milk within the applicable market. Should a plant located in one of these neighboring markets become regulated under the Texas order, this would not change the minimum price necessary to attract an adequate supply of milk to that plant on a normal and regular basis. If the price were allowed to decrease, for example, because the plant became regulated under the Texas order, the supply of milk available to the plant could be jeopardized over a period of time. Producers supplying milk to the plant would seek the higher-valued alternative market represented by the other plants that remain regulated under the other order. On the other hand, a price higher than that provided under the other order reasonably could be concluded to be higher than is necessary to attract milk to that location. It is appropriate, therefore, to have the Class I price under the Texas order reflect the level of the Class I price established under the other orders for plants located in certain nearby markets.

To implement this arrangement, the order should provide for several pricing zones that generally correspond

with the areas where the various Class I price levels under the other orders apply in these nearby markets. Accordingly, the following location adjustments should apply at plants in the zones indicated:

(1) The area now comprising the Texas portion of the Texas Panhandle marketing area, plus Lipscomb County, Texas—minus 7 cents.

(2) The area now defined as the Lubbock-Plainview marketing area, plus Parmer County, Texas—plus 10 cents.

(3) The area now comprising the Texas portion of the Red River Valley marketing area—minus 12 cents.

(4) The Oklahoma counties of Comanche, Cotton, Jefferson, Stephens and Tillman (which zone included the city of Lawton)—minus 24 cents.

(5) The Oklahoma counties of Carter, Love and Marshall (which zone includes the city of Ardmore)—minus 27 cents.

(6) The Oklahoma counties of Beckham, Greer, Harmon and Jackson (which zone includes the city of Elk City)—minus 28 cents.

(7) The Oklahoma counties of Caddo, Canadian, Cleveland, Garvin, Grady, Johnston, Kiowa, McClain, Murray, Oklahoma, Pontotoc, Pottawatomie, Seminole and Washita (which zone includes the cities of Oklahoma City and Norman)—minus 34 cents.

(8) Most of the counties in the northern half of Oklahoma (as listed in the attached order)—minus 44 cents.

This reflects a minor change from the proposed pricing set forth in the recommended decision. In that decision, it was provided that the location adjustment for plants located in the nearby markets be the amount by which the

Zone 1 (Dallas) Class I price differs from the Class I price applicable at such plant when pooled in that market. Such adjustment would have been a plus amount if the Zone 1 Class I price was lower and a minus amount if such price was higher.

Under the initially recommended procedure, the Class I prices for the several out-of-area zones would have been whatever prices were established under the orders for the neighboring markets. Accordingly, such zone prices could have been changed on the basis of amendatory proceedings for the other markets rather than for the Texas market. Although the need for coordinating the Texas order prices with those in nearby markets remains, it would be preferable that the Texas order prices at all locations be fixed on the basis of a hearing for the Texas market.

The several out-of-area zones established herein do not include zones for New Mexico, El Paso County in Texas, Louisiana and Arkansas. Such zones had been set forth in the recommended decision. Plants in Arkansas should be subject to location adjustments determined on the basis of the 1.5-cent rate as measured from Dallas. No location adjustments should apply at this time in New Mexico, El Paso County and Louisiana. This pricing was proposed by the merger proponent and was uncontested by other parties. Because the latter areas are located generally east or west of the proposed marketing area, there is some question as to what may be the appropriate price for plants located in such areas should the plants become associated with the Texas market. No Texas order plants are now located in these areas and there was no indication that this might be the case later. Therefore, the Dallas zone price should apply until such time as there may be reason to explore this pricing in the context of an actual operating situation.

Two distributing plants located in adjacent markets are now regulated under orders involved in the merger. A plant at Burkburnett, Texas, which as pooled under the San Antonio order, is located in the Red River Valley marketing area. A plan pooled under the North Texas order is located at Elk City, Oklahoma, which is in the Texas Panhandle marketing area. Under the adopted location adjustment provisions, the Class I price now applicable at the Burkburnett plant would be continued. The present Class I price at the Elk City plant, however, would be increased 15.5 cents per hundredweight. An increase of 10.5 cents was proposed by the merger proponent. The Elk City plant operator did not testify at the hearing.

The North Texas Class I price at Elk City is based on a location adjustment rate of 1.5 cents for each 10 miles or fraction thereof that the plant is from the Dallas city hall. Elk City is 290 miles northwest of Dallas. This results in a Class I differential of $1,885 at the Elk City plant. Under the Texas Panhandle order, the Class I differential at the Elk City plant is $2.04, or 15.5 cents above the North Texas price at this location.

The Class I price at Elk City based on the transportation rate of 1.5 cents per 10 miles from Dallas does not reflect the proper value of milk under the merged order at the Elk City location. If multiple basing points were used under this order for determining location adjustments at plants located outside the marketing area, the price at Elk City probably would be based on its distance from some location in the present Central West Texas marketing area, such as Abilene or Midland. The present Class I differential at these cities, which will be continued, is $2.57, Elk City is located north of Abilene about 235 miles and 360 miles northeast of Midland. Based on the 1.5 cents per 10 mile transportation rate, the Texas Panhandle Class I price at

Elk City more closely reflects the actual location value of milk at Elk City relative to the value of milk at regulated plants at Abilene and Midland than does a price based on Dallas. Adjusting the prices at Abilene and Midland back to the Elk City location, the Class I differential at Elk City would be $2.21 and $2.03, respectively, which may be compared with the $2.04 differential adopted herein.

It should be noted further that if the Elk City handler procures supplemental milk from either the Hillsboro or Wichita, Kansas, pool plants the Class I price at either of these locations plus transportation would be about 10 cents higher than the Class I price established under the Texas Panhandle order at Elk City and adopted herein for that location. Thus, the higher Class I price that would be applicable under the merged order to the Elk City handler, relative to his current price under the North Texas order, must be considered as being reasonably aligned with Class I prices at other relevant locations.

The producers who supply the Elk City plant should be compensated for the economic service to this plant of making milk available to it. Unless the Texas Panhandle price level is maintained at this plant, producers delivering to the plant eventually will seek alternative outlets where the Class I price is more commensurate with the location value of their milk.

At a plant located outside the areas described above, the location adjustment should be minus 1.5 cents per hundredweight for each 10 miles or fraction thereof that such plant is located from the Dallas, Texas, city hall. Such distance should be based on the shortest hard-surfaced highway distance as determined by the market administator.

Plants that would be subject to this adjustment generally will be those located in the northern supply area in

Kansas and Missouri. Texas pool plants are now located at Wichita and Hillsboro, Kansas. Location adjustments computed at this rate for plants located in this general area north of Dallas will reflect the lesser location value of milk for this market at the more distant northern plants relative to plants nearer the marketing area. Such adjustments will provide uniform pricing to handlers for milk received at the market from distant plant locations and will reflect the appropriate economic value of milk to producers in consideration of the point of delivery of their milk.

Any greater location adjustment rate for plants located outside the marketing area would not result in the proper alignment of prices in the Texas market with prices in markets to the north. As described earlier, intermarket price relationships historically have been based on a transportation rate of 1.5 cents per 10 miles. The use of a different rate would need to be coordinated with a review of this issue for a much broader region than is involved here.

Location adjustment credits. A handler regulated under the South Texas order proposed that handlers receive a Class I price credit on producer milk received and processed in one price zone and then distributed into a lower-priced zone. The credit would be equal to the difference in Class I prices applicable in the two zones. The proposal should not be adopted.

The price established under the order at each plant location is the price that is considered necessary to bring forth an adequate supply of milk at that location. To reduce the price at any location because the handler has route distribution into a lower-priced zone could jeopardize the ability of the handler to continue to receive an adequate supply of milk. Further, such a provision could undermine the effectiveness of the Class I pricing pro-

visions to bring forth an adequate supply of milk for the entire market.

The proponent handler claimed in his exceptions to recommended decision that the lack of price credits on sales made in lower-priced zones precludes a handler from distributing milk in areas generally north of his processing plant. It was his contention that the further south a plant is the less area there is left in which a handler can effectively compete for fluid sales.

The need for increasingly higher Class I prices from north to south already has been indicated herein. It is recognized that handlers generally cannot compete as effectively in lower-priced areas as in their own local area or in the higherpriced zones. But this is not the fault of the regulatory program, as implied by proponent. In the absence of regulation, prices in Texas still would be expected to increase from north to south. Handlers, in this case, would be faced with the same competitive situation as now. The order should not provide the relief sought.

In conjunction with its pricing proposal, the merger proponent urged the continuation of the North Texas order provisions that preclude the application of location adjustments under certain conditions. A supply plant some distance from the market, for example, may ship producer milk to a distributing plant, with the two plant operators claiming a Class I use of the milk. Normally, the pool obligation of the supply plant operator for the producer milk transferred as Class I milk would be the Class I price as adjusted for the location of his plant, rather than the f.o.b. market price. There may be those cases, however, where the distributing plant receiving supply plant milk has sufficient milk from local direct-ship producers to cover most or all of its Class I sales. In this situation, the supply plant milk is not needed at the market for Class I use

and the North Texas order, and four of the five other orders to be merged, would not apply a Class I price location adjustment at the supply plant. Thus, the supply plant operator would not receive the location adjustment credit (equal to the amount of the location adjustment at his plant) otherwise applicable with respect to his pool obligation for the Class I producer milk so transferred.

The basic concept of this limitation on location adjustment credits should be carried forth under the merged order. A distributing plant operator should be encouraged to use locally-produced milk first for his Class I needs. If a handler were permitted to bring in supply plant milk for Class I use and channel the local supply into lower-valued uses, this would result in a lowering of returns to producers on the market. This is because the Class I milk involved would be priced not at the location of the distributing plant but rather at the supply plant location where the Class I price is lower. This would subvert the intent of the Class I price level at the distributing plant, which is to attract milk to that location for Class I use. It is this price level, then, that must be reflected in the returns to producers.

To adapt this concept to the pricing structure adopted herein (which includes the announced Class I price for Zone 1 with plus or minus price adjustments at other locations), it is necessary that the location adjustment credit provisions differ somewhat from those proposed by the merger proponent. The basic intent, though, is to insure that producers on the market do not have their returns lowered through the granting of price credits on milk unnecessarily moved between pool plants for other than Class I use.

In this connection, location adjustment credits should not apply to Class I milk shipped by pool plants to lower-

priced zones. Although this would not be a usual movement of milk, such movement could occur in situations where a plant in the southern part of the marketing area received milk in excess of its fluid requirements, and sought to market such excess with handlers in San Antonio, for example. The Class I price levels established at the southern locations of the market are contemplated to attract milk to these areas for Class I use there, not for reshipment to lower-priced zones. The latter should not be encouraged through the granting of price credits on such milk movements. If the prices provided tend to attract greater quantities of milk than are needed locally, then consideration should be given to whether a lower price should be provided.

Distributing plants relying on supply plant milk for Class I use should be encouraged to draw such milk from the nearest plant or plants. It is possible that near-in supply plant milk might be claimed as having been used in Class II, for example, while an equivalent amount of more distant supply plant milk received at the city might be claimed as having been used in Class I. Although the more distant plant would be eligible for a location adjustment credit under the provisions adopted herein, such credit would be limited, in this example, to the lesser credit that would have been applicable to the near-in supply plant milk had it been classified as Class I milk.

It should be noted at this point that the location adjustment credit provisions in the attached order reflect a slight modification from those set forth in the recommended decision. In computing such credit, it must be determined how much Class I utilization at the transferee-plant is to be passed back to the transferor-plants. The recommended decision provided that this amount would be the transferee-plant's Class I utilization remaining after

subtracting any receipts of other source Class I milk and 95 percent of the receipts of producer milk. However, the Class I utilization should be reduced also in this particular computation by any receipts of packaged Class I milk from other pool plants. Failure to do so would base the need for supply plant milk at the distributing plant on an inflated Class I utilization at the latter plant. Moreover, location adjustment credits are, in effect, automatically allowed on interplant transfers of packaged milk from a lower-priced zone since the milk in all cases is priced at the plant were packaged.

Pricing milk not needed for Class I use. The Class II price under the merged order should be the basic formula price for the month plus 10 cents. The Class III price should be the basic formula price for the month. These prices should be announced by the 5th day after the month to which they apply.

Such prices are now applicable under each of the six orders to be merged. They were adopted for all but the South Texas order in conjunction with the 39-market classification proceedings referred to earlier in this decision. The South Texas order pricing was coordinated with that of the other orders on the basis of an interim decision resulting from this merger proceeding. As previously indicated, the merger hearing was held after the issuance of revised recommended decisions for the classification proceedings but prior to the Department's final decisions.

At the merger hearing, there was general agreement among producers and handlers that the Class II price should be set at 10 cents over the basic formula price. It was proposed, however, that such price for the month be announced on the 5th day of the preceding month and be based on the basic formula price for the second preceding month. Handlers testified that in the absense of

advance pricing they are disadvantaged by not knowing the cost of producer milk for Class II use until after the end of the month in which the milk is processed. They contended that when there is a significant increase in the Class II price the delayed announcement of the increase prevents them from adjusting their resale prices on a timely basis.

A similar proposal by handlers was denied in the 39-market proceedings, as well as in connection with the interim action on the South Texas order. This merger proceeding does not present changed circumstances that require a different conclusion with respect to the Texas market. The proposal is therefore denied.

With respect to the Class III price, the merger proponent urged that such price be the lower of the basic formula price or a butter-nonfat dry milk formula price. For the months of March through July and December, however, the cooperative proposed that this price level be reduced 14 cents.

Similar pricing for Class III milk was proposed for Texas and other southwestern markets by the cooperative in connection with the 39-market classification proceedings. The basic justification for this price level as presented by the cooperative at the merger hearing generally paralleled that presented at the classification proceedings. There is no basis for establishing a Class III price for the Texas market different from that just recently found appropriate for the separate orders.

Butterfat differential. A single butterfat differential should apply under the merged order. It should be computed by multiplying the average Chicago 92-score butter price for the month by 0.115, and rounding such amount to the nearest 0.1 cent. The differential should be an-

nounced by the market administrator by the 5th day after the end of the month in which it applies. This differential is now applicable under the separate orders and was adopted in conjunction with the uniform classification plan now in use.

A handler proposed that a butterfat differential to adjust Class I and Class II prices be computed by multiplying the Chicago 92-score butter price for the second preceding month by 0.115. Such differential would be announced on the 5th day of the month for the following month.

The appropriate butterfat differential was an issue dealt with in the 39-market proceedings. The evidence of record does not furnish sufficient support for departing from the provisions just recently adopted for the separate orders. The proposal is denied.

(d) *Distribution of proceeds to producers.* A market-wide pool should be used under the merged order as a means of distributing among all producers in the market the total proceeds derived from the use of all producer milk by all regulated handlers. Under marketwide pooling, a uniform price is paid to all producers regardless of how a particular producer's milk is used by the handler to whom it is delivered. By receiving payment at the uniform price, each producer shares in the higher-valued Class I milk in the market as well as in the lower-valued Class II and Class III uses of milk. This type of pooling is now being used in five of the individual markets to be merged and was proposed for use under the merged order.

In the Austin-Waco market, producers are now paid through individual-handler pools. Under this arrangement, a uniform price is determined for each handler rather than for the market, with the price for each handler re-

flecting the classified use value of all producer milk received by that handler. Only two distributing plant operators were reguated under the Austin-Waco order at the time of the hearing. From a practical standpoint, there will be little impact on these handlers or the producers supplying them in changing to a marketwide pooling arrangement in this segment of the Texas market.

Payments to producers. The merged order should provide that handlers pay all order obligations for milk to the market administrator, who in turn would distribute such money, in terms of the uniform price, to producers, cooperative associations and handlers who elect to pay their non-member producers.

Under the separate orders, producers are now paid by the handlers receiving their milk. It is necessary under this arrangement, however, that part of the money paid by handlers with higher than market-average Class I utilization be used in paying producers supplying other handlers with less than market-average Class I utilization. This exchange of money between handlers is accomplished through a "producer-settlement fund" operated by the market administrator. Handlers with higher than market-average Class I utilization pay any excess of the value of their producer milk over its value at the uniform price into this fund. Other handlers receive from the fund payments that are included in the uniform price they pay to producers.

The cooperative advocating the merger, proposed that the market administrator collect from handlers all order payments due producers. Under the cooperative's proposal, each handler would make partial payments to the market administrator by the 25th day of the month for milk received during the first 15 days of the month. The payment rate would be the Class III price for the pre-

ceding month. The remainder of the handler's obligation for milk received during the month would be paid to the market administrator by the 13th day of the following month.

Following the receipt of the partial payments by handlers, the market administrator would pay producers such monies by the last day of the month. The cooperative's proposal would require final payments to producers by the market administrator by the 15th day after the end of the month. In those cases where a cooperative is collecting the payments for milk of its members, the proposal would require partial and final payments by the market administrator two days prior to the date payments are due individual producers.

This payment schedule under the cooperative's proposal is predicated on the filing of handler reports of receipts and utilization by the 7th day of the month and the announcement of the uniform price by the 12th day.

Proponent urged the adoption of its proposed payment arrangement on the basis that this would provide handlers with a stronger incentive for making prompt payment of their order obligations. The cooperative claimed that since handlers tend to pay the market administrator on a timely basis all producer monies should be channeled through him rather than having handlers pay producers directly. Also, proponent contended that late payments by certain handlers result in an inequitable situation for those handlers making timely payments. This is because the delinquent handlers are using money due producers to overcome cash flow problems while the prompt handlers with similar problems must borrow money or use their own capital.

Some objection to this payment arrangement was expressed by handlers, primarily on the grounds that it would

interfere with normal handler-producer relationships. A number of handlers in the Texas market are supplied by producers who do not belong to a cooperative association. It was claimed that in these cases handlers would have a better opportunity to maintain good relations with the producers supplying them if such producers are paid by handlers rather than by the market administrator. In this connection, a handler proposed that if the order does provide for payments to producers by the market administrator handlers nevertheless should be permitted to pay their nonmember producers.

If the order is to serve the intended purpose of promoting orderly marketing in the Texas area, it is essential that handlers pay their order obligations on a timely basis. Under the customary arrangements of producers being paid twice a month, handlers have the use of producer milk for considerable periods of time before any payments for such milk are due. Producers should not be expected to wait beyond the scheduled times for their milk payments. Delayed payments not only foster uncertainty and discontent among producers but also place them in a difficult position with respect to meeting their own financial obligations on a timely basis.

From the standpoint of handlers, also, it is necessary that all order obligations be paid on time. Otherwise, the order could place those handlers who are in compliance at a competitive disadvantage with delinquent handlers who are using monies due producers as a free source of funds for operating purposes.

For these reasons, the Texas order should be structured to encourage prompt payments by handlers. Although the method now provided under the separate orders for paying producers is basically a satisfactory arrangement, there are several aspects of the payment method adopted herein

that will tend to provide producers with somewhat greater assurance that they will be paid for their milk deliveries on a timely basis.

Under a plan whereby all payments by handlers are made to the market administrator who in turn pays producers, the fact of payment to producers is a matter of the market administrator's immediate knowledge. When handlers pay producers directly, a failure to make full payment to producers by the dates specified in the order usually does not become known to the market administrator at the time of noncompliance. Some time may elapse before normal audit procedures reveal any payment irregularities.

Also, the payment plan adopted herein tends to be self-policing. Payment would not be made by the market administrator to producers delivering milk to a handler who fails to pay his obligation to the producer-settlement fund. Thus, such producers would be immediately aware of when the handler receiving their milk fails to pay his pool obligation. Presently, a handler may pay his producers the blend price while at the same time fail to pay an amount due the producer-settlement fund. In the absence of any knowledge of the handler's financial difficulties, the producers presumably would continue to ship milk to the handler. Only when the handler's financial problems become so great as to result in nonpayment to his producers would the producers realize the possible need for seeking a different outlet for their milk. Under the adopted payment procedure, the producers would be aware of the handler's financial difficulty in the first month of nonpayment. They then would be able to consider on a more timely basis the possible need for making other arrangements for the sale of their milk before the probable loss as a result of nonpayment mounts to the point that the producers would be placed in a severe economic bind.

In addition, the adopted payment procedure should reduce current pressures on cooperative associations to grant credit to handlers who may be delinquent in payment of the uniform price for milk received from member producers. The tendency for extension of credit by cooperatives should be minimized when handlers are required to make payments for producer milk directly to the market administrator rather than to the cooperative.

Recognition should be given under this payment arrangement to the desire of handlers to pay the producers supplying them with milk. Such payments should be permitted with respect to those producers for whom a cooperative is not collecting payments. For all practical purposes, this generally would include only those producers who are not members of a cooperative association.

As provided herein, the handler would be required to pay his full obligation for milk to the market administrator in the same manner as other handlers who are not paying producers directly. This would be so in the case of both the partial and final payments. Upon receipt of the proper payment, the market administrator then would transfer sufficient money to the handler so that he could pay his producers.

A handler contended in his exceptions that under this arrangement there is no need for the money that a handler pays to his producers to be transferred first to the market administrator. A basic purpose of changing to the payment method adopted herein is the encouragement of timely payments by handlers. To effectively implement this concept, it is desirable that the handlers purchasing milk from nonmembers as well as those obtaining milk from a cooperative pay their order obligations to the market administrator by the dates prescribed herein. Through this means, the market administrator will be immediately aware

in the case of all handlers of a handler's inability to meet his order obligation.

Any handler who the market administrator determines is delinquent with respect to any payment obligation under the order should not be eligible to receive money from the market administrator for payment to producers. Any transfer of money by the market administrator to a handler in this circumstance would remove much of the incentive for a handler to consistently comply with the order's payment requirements. So that there might be a reasonable demonstration of compliance with the order, a delinquent handler should not be eligible to pay his producers until he has met all prescribed payment obligations for three consecutive months.

In his exceptions to the recommended decision, a handler urged that this three-month requirement not be adopted. He pointed out that late payments to producers do occur occasionally because of human error. It was his contention that the three-month requirement classifies such human errors the same as a deliberate late payment or nonpayment by a handler and penalizes the handler to the same degree in either case.

It is quite possible that a late payment to producers by a handler may occur unintentionally. There is no practical way from an enforcement standpoint, however, to distinguish between intentional and unintentional late payments. Even if there were such a way, it is questionable whether there should be any relief from the three-month requirement. As stated earlier, the purpose of the adopted producer payment method is to provide producers with greater assurance that they will be paid for their milk deliveries on a timely basis. It must be recognized that under this new payment method permitting a handler to pay his nonmember producers is to a certain extent no

change from the present payment method. If the order is to allow handlers the option of paying nonmembers, it is necessary that there be some incentive to pay their producers on a timely basis. In the absence of this incentive, such as losing their eligibility to pay producers for a three-month period, handlers may tend to become lax in their payment procedures.

Handlers expressed concern in their exceptions that providing for the payment of producers by the market administrator will result in higher administrative assessments on handlers. This is not likely.

A very large proportion of the producers in the Texas market are members of cooperatives. It is expected that the individual members will be paid by the cooperatives, not by the market administrator. The latter would need only to transfer a lump-sum payment to the cooperatives for further distribution among their members. Also, it is presumed that most of the handlers receiving milk from nonmembers will elect to pay such producers. In this case, also, the market administrator would be making only lump-sum payments to the handlers, not payments to individual producers.

Under the adopted payment procedure, it is imperative that the payments received by the market administrator from handlers represent sound money. This is necessary, of course, under the present payment arrangement. However, because the new procedure will result in substantially greater amounts of money being transferred in and out of the producer-settlement fund, receipt of a bad check of a substantial sum could render such fund insolvent.

With the payment schedule adopted herein, the market administrator will need to make payments to cooperatives

and certain handlers the day after the payments are due to him from all handlers. Such payments will have to be made with the belief that the checks received from handlers and deposited in the producer-settlement fund are, in fact, good. Time will not permit the clearance of such checks through the banks prior to the withdrawal of money from the producer-settlement fund. The need for the market administrator to receive only sound money is thus obvious.

The attached order does not prescribe the specific means by which handlers shall make payment to the market administrator. The need for such specificity should be based on actual experience in the market. As long as handlers make full payment by the prescribed payment dates and their checks are good, there is no problem. However, if the market administrator, because of prior experience or for other reasons, does not have reasonable assurance that payments tendered would represent sound money, it is necessary that he have the administrative discretion to prescribe the means of acceptable payment.

Under the terms of the order, the market administrator has the authority to make rules and regulations to effectuate the terms and provisions of the order. Should there be an urgent need for greater specificity with respect to the procedures for making payments, this may be accommodated through the promulgation of appropriate administrative rules with the approval of the Director of the Dairy Division and in consultation with the local industry.

It is appropriate to note at this point an apparent misconception on the part of certain handlers as to how interbank transfers would be implemented should this means of payment be used. In their exceptions, two handlers expressed concern that this means of payment would provide the market administrator with direct access to a handler's bank account. This, of course, is not possible. The inter-

bank transfer of money from the handler's bank account to the market administrator's bank account could occur only at the direction of the handler.

A schedule of payment dates somewhat different from that suggested by the merger proponent should apply under the merger. As provided herein, handlers would be required to make a partial payment for milk received from producers or a cooperative bulk tank handler during the first 18 days of the month. Handlers would be required to report such receipts to the market administrator by the 24th day of the month. Payment for such milk by the handlers would have to be received by the market administrator by the 26th of the month. On the 28th of the month, the market administrator would distribute these payments to producers who do not receive their payments through a cooperative association or from a proprietary handler who has requested the option of paying his own producers. In the case of producers receiving their payments from a cooperative or proprietary handler, the market administrator would make payments to such parties a day earlier so that payments to the individual producers could be made at the same time as for other producers.

The rate of the partial payment would be the Class III price for the preceding month. This rate is now used under the individual orders in making partial payments to producers, and producers urged that it be continued.

Final accounting for milk from producers and cooperative bulk tank handlers would be completed after the end of the month. Handlers would be required to submit to the market administrator a report of such receipts by the 6th day after the end of the month and a report of all receipts and utilization by the 7th day. The uniform price would be announced by the 13th day. Final payment by handlers at the classified use value for all milk received

during the month would have to be received by the market administrator by the 16th day after the end of the month. Payments due producers would be distributed by the market administrator by the 17th day to cooperatives collecting for members and to proprietary handlers who elect to pay their own producers. Individual producers who do not receive their payments through a cooperative association or a proprietary handler would be paid by the market administrator on the 18th day after the end of the month.

The dates set forth above reflect a slight modification of the payment dates prescribed in the recommended decision. Initially, it was indicated that a handler's payments to the market administrator should be made by the 24th day of the month in the case of the partial payment and by the 14th day after the end of the month with respect to the final payment. Under that schedule, it was intended that payments by mail, for example, would have to be postmarked by the specified date.

As noted earlier, the attached order does not prescribe the means by which a handler must make payment to the market administrator. Unless some specificity in this regard is found necessary later, handlers should be given the flexibility of using whatever payment means they wish. The only requirement would be that a handler's payment must be *received* by the market administrator by the prescribed dates. Such dates would be the 26th day of the month for the partial payment and the 16th day after the end of the month for the final payment. Payments not received by these dates would be considered late and subject to the charge on overdue accounts. Under this arrangement, each handler, of course, will have to determine what means of payment will result in timely payments for him.

Recognition was not given in the recommended decision to occasional conflicts between scheduled payment dates and weekends. It is desirable that producers be paid as soon as possible. For this reason, the payment schedule adopted herein purposely leaves little time between the dates when handlers must make payments to the market administrator and when payments must then be made to producers by the market administrator and handlers. However, should a payment date fall on a weekend when offices normally are not open for business, the "tight" payment schedule could not be adhered to in all cases.

Accordingly, if the date by which payments must be received by the market administrator, or made to producers, cooperative or handlers, falls on a Saturday or Sunday or on a Monday that is a national holiday, payments should not be due until the next day on which the market administrator's office is open for public business. Further, the order should provide that when the partial or final payments are so delayed, the corresponding payments by the market administrator to handlers, cooperatives and producers, as well as the subsequent payment by handlers to producers, may be delayed by the same number of days.

This schedule of reporting and payment dates will result in producers receiving their final payment for milk as soon as possible after the end of the month. Although the final payment would be made three days later than proposed by producers, adequate recognition must be given to the time that it will take to get handler reports and payments to the market administrator by mail. This is particularly significant in view of the very large geographical area to be encompassed by the Texas market. It will be noted that even under the schedule adopted herein there is not sufficient time between the announcement of the uniform price and the date handlers must pay the

market administrator to permit timely notification by mail of each handler's obligation. It is contemplated that the market administrator will need to notify handlers immediately by telephone of their order obligations, with written confirmation to be supplied later. Similarly, the adopted schedule contemplates that payments by the market administrator to proprietary handlers who are paying producers and to cooperatives collecting payments for members will be available by the next day for payment to individual producers. To assure this, it will be necessary for the market administrator to arrange for an interbank transfer of funds so that producer payments can be made on a timely basis.

Producers delivering milk under the six individual orders now receive a final payment for milk on the 15th day of the following month. Under the merged order, final producer payment would not be due until the 18th. Because of this, the partial payment for milk should cover a producer's deliveries during the first 18 days of the month rather than 15 days as is now provided under the individual orders.

In its exceptions, a cooperative association objected to the dates set forth in the recommended decision for announcing the blend price and for making the various payments. It urged the adoption of the various dates proposed at the hearing by the merger proponent. The cooperative claimed that producers should not be subjected to a three-day delay in being paid for milk just because of merging the orders. Also, the cooperative indicated that the payment dates under the Texas order would be different from those applicable in other Federal order markets in which the cooperative markets milk. This, it claimed, would cause difficulties for the cooperative in coordinating its computerized payrolling procedures for members in the various markets.

It is recognized that for the first month under the merger most producers would be paid three days later than under the separate orders. From then on, however, the interval between payments would be the same each month. Although the initial delay in payments can be expected to be an inconvenience to producers, it is hardly conceivable that this would place them in dire financial straits. As already pointed out, the partial payment for milk would cover milk deliveries during the first 18 days of the month rather than during the first 15 days as at present. This should help offset the initial impact of the change in payment dates.

Although payrolling procedures for cooperatives would have to be changed, the inconvenience that this may cause cannot be overriding in fixing the payment dates for the merger order. The coordination of payment dates among orders, although presumably desirable for regional cooperatives, would not be achieved even if the payment schedule urged by the cooperative were adopted for the Texas order. It must be recognized by the industry that as regulated areas become larger through the merger of orders, more time will be required under the procedures now common used to comply with the various reporting and payment requirements of an order.

In making their partial and final payments to the market administrator for deposit in the producer-settlement fund, handlers would be permitted to subtract deductions authorized in writing by producers from whom milk is received. It is expected, of course, that the amounts deducted by handlers would be paid to the assignees by the time the handler payments are due the market administrator. This is necessary if all handlers are to be paying the minimum class prices for their producer milk by the dates required in the order. Such deductions for each

producer should be limited to the value of his milk for the period concerned. The market administrator would take these deductions into account in making payments from the producer-settlement fund to producers, cooperative associations and proprietary handlers who elect to pay their producers.

It was pointed out by a handler in his exceptions that the order proposed in the recommended decision would not recognize partial payments that a handler may choose to make to his producers prior to the payment dates prescribed by the order and that the order, in fact, would preclude such payments. This was not intended and the attached order has been modified accordingly. A handler should be able to pay his producers as often as he wishes. The only requirement should be that the producers be paid at least the minimum prescribed amount by the time specified in the order.

Payments for milk from cooperative association plants. The cooperative proposing the merged order proposed that pool plant operators receiving bulk milk from a cooperative association's plant be required to pay for such milk in the same manner as it proposed for bulk tank milk received directly from the farm. This proposal should be adopted but only with respect to milk received from a plant regulated under the Texas order.

To a large extent, milk marketed by the proponent cooperative is moved to distributing plants directly from the farm. At the same time, however, some milk is moved to such plants, either on a regular basis or a supplemental supply basis, from the cooperative's supply plants and balancing plants in the market. Irrespective of the supply arrangement used, the producers involved are supplying milk for the fluid market and should be assured of receiving payment for their milk. Such assurance is essential

to the orderly marketing of milk and the maintenance of an adequate supply of milk for consumers. Moreover, such a payment requirement is consistent with the Act, which provides that no cooperative association may sell milk to any handler at less than the prescribed order class prices.

Accordingly, handlers receiving bulk fluid milk products from the pool plant of a cooperative should be required to make partial and final payments to the market administrator by the same dates as specified for handlers receiving milk directly from producers or a cooperative acting as a bulk tank handler. The partial payment, which would apply to receipts during the first 18 days of the month, should be at the Class III price for the preceding month, as adjusted by the butterfat differential for such preceding month. The final payment should be based on the classified use value of all bulk fluid milk products received during the month from the cooperative's plant. Upon receipt of the money, the market administrator would then transfer such funds to the cooperative.

In this regard, the Class I price to be used in computing a handler's obligation for plant milk from a cooperative should be the higher of the Class I prices applicable at the plants of the handler and the cooperative. Thus, in those cases where Class I milk is transferred from a cooperative's plant to a distributing plant in a higher-priced zone, the distributing plant operator would be obligated for such milk at the Class I price applicable at his plant. This price, in most cases, would reflect the value of the milk at the cooperative's plant plus the cost of transporting it to the distributing plant. This is the same price that would apply to Class I milk received at the distributing plant directly from producers or a cooperative acting as a bulk tank handler and thus provides uniformity of pricing among handlers.

Class I milk may be transferred, on the other hand, from a cooperative's pool plant to a pool distributing plant in a lower-priced zone. In this case, the distributing plant operator will be required to pay the cooperative (through the market administrator) for such milk at the Class I price applicable at the cooperative's plant. Payment at this price level is necessary if the payment provisions are to be consistent with the Act.

The Act states that a cooperative that is reblending the proceeds from the sale of its members' milk may not sell milk to any handler at less than the class prices applicable to the cooperative on such milk. Under the order, the cooperative would have to account to the pool for the Class I milk transferred from its plant to a lower-priced zone at the Class I price applicable at its plant. Since the cooperative could not sell the Class I milk at less than this price, this is the price that the buying handler must be required to pay. It is recognized that under this arrangement such a sale would be uneconomic to the buying handler and under most circumstances would not take place.

The order appropriately may not impose a payment requirement on a handler for milk received from another order plant operated by a cooperative association if no pool obligation is applicable on such milk. Although such a proposal was suggested by the merger proponent, very limited attention was given to this issue at the hearing, presumably because of the indication by proponent that Texas pool plants are not being supplied by other order plants.

To place a payment obligation on such transactions would in effect reprice milk on which a price obligation in accordance with actual use has already been imposed under another order. In this situation, the imposition of a pay-

ment obligation under the Texas order is neither necessary nor appropriate under the circumstances existing in the Texas market.

Advertising and promotion program. The merged order should provide for the continuation on a combined basis of the advertising and promotion programs now operating under the six orders.

The Agricultural Marketing Agreement Act provides that a Federal milk order may include provisions establishing research and development projects, advertising (excluding brand advertising), sales promotion, and educational and other programs designed to improve or promote the domestic marketing and consumption of milk and its products. Advertising and promotion programs, all with identical provisions, were first applicable under five of the six orders on November 8, 1972, with respect to marketings on and after January 1, 1973. An identical program was provided in the South Texas order on April 27, 1973, with respect to marketings on and after July 1, 1973. It was proposed by the merger proponent that these programs be continued on a combined basis under the merger.

A witness representing another cooperative association in Texas testified in opposition to the advertising and promotion program. At the time of the hearing, the witness was a member of two advertising and promotion agencies. Objections were directed basically toward what was described as low-key, nonbrand name advertising in the Texas markets and the lack of any correlation between increased advertising and increased sales of milk.

Although no data were provided for the record to demonstrate the effectiveness of the advertising and promotion programs under the six individual orders, the program continues to carry out the purposes of the Act.

All funds for the operation of such a program would be made available only by producers who participate on a voluntary basis. Any producer who does not wish to participate may request a refund of the assessments made against his milk deliveries. In view of the support for the program by a substantial number of the producers supplying the proposed Texas market, it is concluded that the merged order should provide for an advertising and promotion program.

The cooperative opposing the continuation of this program reiterated its position in its exceptions to the recommended decision. For the reasons just stated, however, the advertising and promotion program should be included in the merged order.

The provisions of the advertising and promotion program adopted herein are identical to those contained in each of the separate orders except for those provisions necessary to effect an orderly transition from six separate programs to a single program for the Texas market. The program would be funded through a 5-cent per hundredweight assessment each month on producer milk pooled during the month. The market administrator would deduct the monies from the producer-settlement fund prior to the computation of the uniform price. All of the monies so deducted, except for certain reserves withheld by the market administrator to cover refunds and his administrative costs, would be turned over to and administered by an agency organized by producers and producers' cooperative associations under the order. The agency would be responsible for the development and implementation of programs and projects approved by the Secretary and designed to carry out the purposes of the Act.

To provide an orderly transition from the six individual advertising and promotion programs, certain pro-

cedures should apply during the initial operation of the program under the merged order. As adopted herein, the agencies established under the programs of the individual orders would continue to function during the first month of the merger as separate agencies under the provisions of the merged order. During this first month, steps would be taken under the order to select members for a new single agency. The new agency would become operative at the beginning of the second month of the merger and at such time would assume all advertising and promotion funds and obligations of the individual agencies.

For the one month of operation under the merger, the six individual agencies would retain their membership as established under the separate orders. The term of office of each member of each agency would expire at the end of such month. This would not preclude, however, their selection as a member of the new single agency.

Because of the very limited incumbency of the members of the individual agencies under the merged order, their activities should be limited essentially to the completion of "old" business, i.e., activities for which budgets have been approved by the Secretary and financial commitments made.

In organizing the new agency, the composition of the agency, as well as the eligibility of producers for agency membership, should be based on those producers who have not requested refunds with respect to milk marketed during the calendar quarter in which the merger becomes effective. When the present programs first became effective under the individual orders, all producers were considered as participating producers for purposes of determining agency composition and membership eligibility, irrespective of whether or not they were actually participating in the program. This was because the programs

were new and a history of participation had not been established. However, after the first year under the program, a producer was ineligible to serve as an elected agency member if he had requested a refund for the most recent calendar quarter. Also, the number of members on each agency was then based on the number of producers actually participating.

Since advertising and promotion programs essentially identical to the program adopted herein for the merged order are now in effect under the separate orders, a history to determine producer participation would be available at the outset of the merged order. Accordingly, the order should recognize a producer's past participation under the separate orders for the purpose of the agency's initial organization. Only those producers who have not requested refunds for the most recent calendar quarter under any order should be considered as participating producers.

The merger of the six orders can be expected to reduce somewhat the total number of agency members now serving under the individual programs. As adopted herein, the merged order, as now under the six orders, would provide that if a majority of the producers supplying the market are members of one cooperative, or combination of cooperatives, its representation on the agency would be limited to the minimum number of representatives necessary to constitute a majority of the agency's total membership. Although this was proposed by the major cooperative in the proposed Texas market, it was indicated that some higher minimum number of agency representatives might be desirable to insure adequate producer representation considering the number of dairy farmers and the wide geographic area that would be covered by the merged order.

Although a wide geographical representation on the agency may have merit, this would not necessarily occur

under the agency selection procedure which the major cooperative proposed be continued under the merged order and which is adopted herein. Under such procedure, a cooperative that is authorized one or more agency members may select any person it may care to choose. Presumably, those chosen would represent the cooperative's position on advertising and promotion matters. Thus, it is questionable whether additional members on the agency for purposes of wider area representation would serve any practical purpose. Additional members would mean, of course, additional administrative expense for the agency. The prudent use of producer money for this program suggests in the final analysis that the agency membership be limited in the manner provided herein.

As under the present orders, the merged order should provide that any producer who does not want to participate in the advertising and promotion program will be eligible for refund of the assessments against his producer milk deliveries by filing an application with the market administrator. Such refund application would have to be submitted within the first 15 days of the month preceding the beginning of a calendar quarter for milk deliveries during such quarter. However, a new producer who enters the market after such deadline could request a refund with respect to his deliveries made between such time of entry and the beginning of the next quarterly period for which he could make a refund request in accordance with the regular schedule.

In this connection, a refund request filed by a dairy farmer under one of the six individual orders for the quarter in which the merger becomes effective should remain valid under the merged order for the remainder of such quarter without such person being required to file another request. On the other hand, a producer who

elected to participate in the advertising and promotion program of one of the individual orders for the quarter in which the merger becomes effective should not be permitted to request a refund of the assessments against his deliveries of producer milk under the merged order until the next quarterly filing period. This latter requirement is appropriate since financial commitments by the agencies will have been made on the basis that such funds would be forthcoming for the entire quarter.

When the merged order becomes effective, all monies held by the market administrator to cover refunds and administrative costs associated with the advertising and promotion programs of the individual orders should be combined for similar use under the merged order. In making refunds for the first time under the merger, the market administrator should honor all valid refund requests filed under the advertising and promotion programs of the individual orders.

(e) *Administrative provisions.—Interest payments on overdue accounts.* The merged order should provide for interest payments on handler obligations that are overdue. Such interest should be at the rate of three-fourths of one percent per month (9 percent annually). Interest should apply beginning the day following the date on which payment of an obligation is due.

It is essential that all handler payments to the producer-settlement fund be made promptly in order that the market administrator will be able to make the required payments to producers. An interest charge on overdue accounts should provide an incentive to handlers to make their payments on time. Moreover, handlers who pay late are, in effect, borrowing money from producers. Without interest payments, handlers delinquent in their payments would have a financial advantage relative to those handlers making timely payments.

It should be noted that interest payments are not a substitute for prompt payments by handlers. Those delinquent in their obligations will be subject to legal enforcement action as authorized under the Act.

The adopted interest rate (three-fourths of one percent per month) was proposed by the merger proponent. This rate is currently applicable under the North Texas and South Texas orders. No testimony was presented suggesting a different rate.

A handler proposed that the interest charge not apply until the third day following the date the payment is due. He contended that the three-day grace period is necessary to allow for delays in mail delivery.

If producers are to be paid on a timely basis, it is necessary that handlers meet their payment obligations on time. To provide a grace period before applying interest charges would, from a practical standpoint, merely be encouraging a delay in payments by handlers. With no penalty for being one or two days late, there would be no incentive to meet the prescribed payment dates.

Administrative assessment. The maximum rate of payment by handlers for the cost of administering the merged order should be 4 cents per hundredweight. Such payments are required if the market administrator is to perform the necessary function of administering the merged order.

Currently, the maximum rates under the separate orders are 4 cents per hundredweight for the North Texas, South Texas, San Antonio and Central West Texas orders and 5 cents per hundredweight for the Austin-Waco and Corpus Christi orders. The 4-cent rate should enable the market administrator to effectively administer the merged order. If experience indicates that the merged order can

be administered at a lesser rate, the order provides that the Secretary may adjust the rate downward without the necessity of a hearing.

Marketing service deduction. With respect to payments to producers, the order should provide for a maximum deduction of 5 cents per hundredweight for marketing services furnished by the market administrator. Such deductions are necessary to enable the market administrator to conduct an adequate marketing service program for producers supplying the market.

The maximum rates now for such services are 5 cents under the North Texas, South Texas and Central West Texas orders, and 6 cents under the other three orders to be merged. The 5-cent rate, which was proposed at the hearing without objection, should permit the market administrator to conduct an adequate marketing service program for those producers not receiving such services (including weighing, testing and providing market information) from a cooperative association. If experience indicates that the services can be performed at a lesser rate, provision is made whereby the Secretary may adjust the rate downward without the necessity of a hearing.

Merger of the administrative expense, marketing service, and producer-settlement funds. To accomplish the merger of the six Texas orders effectively and equitably, the reserves in the administrative expense funds that have resulted under the individual orders should be combined. Similar procedure should be followed with respect to the marketing service and producer-settlement fund reserves of the individual orders. Any liabilities of such funds under the individual orders should be paid from the appropriate new fund established under the merged order. Similarly, obligations that are due the several funds under the individual orders should be paid to the appropriate combined fund under the merged order.

The money paid to the administrative expense fund is each handler's proportionate share of the cost of administering the order. It is anticipated that all handlers currently regulated under the individual orders will continue to be regulated under the merged order. In view of this, it would be an unnecessary administrative and financial burden to allocate back to handlers the reserve funds under the individual orders and then accumulate an adequate reserve for the merged order. It is equally equitable and more efficient to combine the administrative monies accumulated under the individual orders and to pay any liabilities against such funds from the consolidated fund of the merged order.

The money accumulated in the marketing service funds of the individual orders is that which has been paid by producers for whom the market administrator is performing services. The producers who have contributed to the marketing service fund of each order are expected to continue to supply milk for the Texas market. The consolidation of the reserves in the individual marketing service funds is therefore appropriate in view of the continuation of the marketing service program for these producers under the merged order.

The producer-settlement fund balances in the six orders should be combined so that the producer-settlement fund under the merged order may be continued without interruption. The producers currently supplying the individual markets are expected to continue to supply milk for the merged Texas market. Thus, monies now in the producer-settlement funds of the individual orders would be reflected in the uniform prices of the producers who will benefit from the merged order. The combined fund would also serve as a contingency fund from which money would be available to meet obligations (resulting from

audit adjustments and otherwise) accruing under one or the other of the separate funds.

Termination of order. Section 608c(16)(B) of the Act sets forth the following provisions concerning the termination of an order:

"The Secretary shall terminate any marketing agreement entered into under section 608b of this title, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: *Provided*, That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order."

For the purpose of implementing the provisions of § 608c(16)(B), the merged order should include a definition of the term "current marketing period." Such term

should mean "the first month following the date on which the Secretary publicly announces his finding that the termination of the order is favored by such majority of producers under the order as is prescribed by the Act."

The six orders under consideration do not now prescribe in specific terms what the marketing period shall be for purposes of implementing § 608c(16)(B), nor do they specify a date by which any termination of the order under this section must be announced. In connection with the development of a merged order, it was urged by certain parties that provisions covering these particular matters be included. Their position was prompted by past litigation involving the question of whether or not the Secretary was properly implementing the provisions of § 608c(16)(B) in response to a request by producers to terminate the South Texas order. Before resolution of the question by the court, the matter became moot with the withdrawal by producers of their request for termination.

Proposals relating to this issue were offered by two cooperative associations and a proprietary handler, all litigants in the case just cited. A cooperative representing a majority of the producers supplying handlers in the six-market area proposed that the merged order define a marketing period as "a calendar month or portion thereof." The cooperative indicated that this definition would give the Secretary the necessary flexibility in terminating an order whenever he finds that a majority of producers no longer favor the order. While the cooperative contemplated under this proposal that the maximum public notice of any termination would be 31 days, it indicated in its brief that up to 90 days' notice would not be inappropriate.

Another cooperative and a proprietary handler proposed that the marketing period be defined as "the fiscal

year beginning April 1 and ending on March 31." They also proposed that any termination of the order under § 608c(16)(B) not be permitted unless announced at least 90 days prior to the end of the current marketing period.

Proponents of the April 1-March 31 marketing period indicated that this period would parallel, and would be consistent with, the marketing year used under the price support program for manufacturing grade milk. Under this program, the Secretary announces annually the support price for milk marketed during the period of April 1 through March 31 of the following year. In addition, proponents suggested that dairy farmers generally make production plans a year at a time, and that the biological production cycle of milk cows covers a year.

A minimum of 90 days' notice of any order termination was intended by proponents to provide handlers with at least this minimum opportunity to adjust their operations in light of the impending absence of regulation or possible regulation under another order. They claimed that both fairness and due process required a substantial notification period so that handlers could make necessary business adjustments to meet the competitive environment of an unregulated market should the dominant cooperative in the market elect to have the order terminated under § 608c(16)(B) of the Act.

The Act and its legislative history provide little, if any, guidance as to what may have been intended by the term "marketing period" as it relates to milk. The provisions of the Act have applicability also to other commodities, such as fruits and vegetables, and in these cases marketing periods are generally well defined by the cyclical nature of the growing and marketing seasons of the products. Such seasonal products are characterized by a usually brief period during the year when the products

are harvested and marketed. This is not so with respect to the production and marketing of milk.

Milk is produced and marketed by dairy farmers on a continuous basis. Although the normal lactation period of a cow is about 300 days, the "dry" periods within a herd are customarily staggered. Thus, each dairy farmer has a continuing daily production of milk. Because of its highly perishable nature, such milk must be delivered within a day or two to plants for processing, the particular delivery schedule usually being dependent upon the storage capacity at the farm.

In view of this daily and continuous character of milk production and marketing, there is no well-defined marketing period for milk. Since the inception of Federal milk orders in the 1930's, however, milk has been accounted and paid for under the regulatory program on a monthly basis. At the end of each month, handlers are required to report all receipts of producer milk and make final payment therefor in accordance with the utilization of the milk during the month. Each successive month constitutes, in effect, a new marketing period for the producer and the handler. The consistent administration of milk orders on this basis over many years suggests that a defined marketing period of any duration other than a month would be totally inconsistent with long-standing regulatory practice in the fluid milk industry.

The Act makes it optional as to the inclusion in an order of a date by which the termination of an order under § 608c(16)(B) must be announced. If no date is specified, the termination must be made effective at the end of the marketing period in which the Secretary finds that termination is favored by a majority of the producers. The absence of such a date could result in notice of termination to the industry of as much as a month or as little as a day.

Handlers and producers who have not requested termination of the order should have at least one month's advance notice of any impending order termination. It is correctly presumed by both handlers and producers that once an order is promulgated for a market it usually will remain in effect indefinitely. History of the Federal order program bears this out. Parties in the market, then, make their decisions on milk marketing with this degree of permanence of regulation in mind. Such decisions for handlers include sources of milk, purchase prices, areas of distribution, sales prices, margins, and duration and value of contracts, all of which might well be decided differently if it were known that they soon would be operating in the absence of order regulation, or perhaps under the terms of another order. Producers, likewise, are continually having to make decisions concerning an outlet for their milk and the terms of sale. These decisions, too, might be different in the absence of regulation. At least one month's advance notice of any order termination would give all parties having an association with the market an opportunity to reassess their operations and to make any desired changes.

The Federal Administrative Procedure Act requires that in the absence of emergency conditions any substantive rule evolving under a program such as the Federal order program shall be announced not less than 30 days before its effective date. Such Act also provides that notice is not required in the case of a rule that grants or recognizes an exemption or relieves a restriction. The withdrawal of an order in a market would relieve handlers from being subject to to specific rules concerning their purchases of milk from dairy farmers (assuming no involvement with another regulated market). Notwithstanding this relief from regulation, the impact of becoming unregulated may well be as significant in terms of new

operational decisions as when becoming regulated for the first time or becoming subject to substantive changes in an order. A minimum notification period of one month, then, would be consistent with administrative practice concerning notice of substantive rules.

The provisions adopted herein for implementing § 608c(16)(B) would result in the industry having from one to two months' advance notice of any order termination. The exact amount of time would be dependent upon the time of the month when the Secretary publicly announces his finding that termination is favored by a majority of the producers in the market. A longer notification period, as urged by certain parties, would not permit a reasonably timely action by the Secretary on the request of a majority of the producers once they decide that they no longer want an order for their market.

In their exceptions, proponents of the April—March 31 marketing period opposed the Acting Administrator's conclusions regarding the matters dealt with under this issue and claimed that such conclusions were not based on the record evidence. The position of exceptors is not supportable and there is no basis for reaching a different position on the marketing period definition and notification period.

Rulings on Proposed Findings and Conclusions

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such

conclusions are denied for the reasons previously stated in this decision.

Rulings of the Administrative Law Judge to which specific objections were taken in the briefs have been reviewed. Objections were raised to the Administrative Law Judge excluding the admission of certain exhibits offered as evidence. These exhibits consisted of press releases and internal memoranda of the United States Department of Agriculture and of Associated Milk Producers, Inc. Objections were taken to the exclusion of these documents on the grounds that the documents would have been admissible in court under the Federal Rules of Evidence.

The Administrative Law Judge's ruling was that this is not an adversary proceeding and thus not subject to the same rules of evidence. He ruled that press releases are not suitable documents of evidence and that the preparers of the memoranda were not available for cross examination at the hearing.

The Administrative Law Judge's rulings have been reviewed in light of the arguments presented. These rulings, for the reasons stated by the Administrative Law Judge on the record, are hereby affirmed.

General Findings

The findings and determinations hereinafter set forth are supplementary and in addition to the findings and determinations previously made in connection with the issuance of each of the aforesaid orders and of the previously issued amendments thereto; and all of said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

(a) The tentative marketing agreement and the Texas order, which amends and merges the Austin-Waco, Central West Texas, Corpus Christi, North Texas, San Antonio and South Texas orders, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the Texas marketing area, and the minimum prices specified in the tentative marketing agreement and the Texas order are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest;

(c) The tentative marketing agreement and the Texas order will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, the marketing agreements upon which a hearing has been held;

(d) All milk and milk products handled by handlers, as defined in the tentative marketing agreement and the Texas order are in the current of interstate commerce or directly burden, obstruct, or affect interstate commerce in milk or its products; and

(e) It is hereby found that the necessary expense of the market administrator for the maintenance and functioning of such agency will require the payment by each handler, as his pro rata share of such expense, 4 cents per hundredweight, or such lesser amount as the Secretary may prescribe, with respect to milk specified in § 1126.85 of the aforesaid tentative marketing agreement and the Texas order.

Rulings on Exceptions

In arriving at the findings and conclusions, and the regulatory provisions of this decision, each of the exceptions received was carefully and fully considered in conjunction with the record evidence. To the extent that the findings and conclusions, and the regulatory provisions of this decision are at variance with any of the exceptions, such exceptions are hereby overruled for the reasons previously stated in this decision.

Certain parties excepted to the Department's failure to include within the scope of the merger hearing proposed provisions intended to prohibit certain unfair methods of competition and trade practices. The inclusion of such proposals in the hearing notice was denied by the Department prior to the hearing. Because this issue was not a part of the hearing and the subsequent deliberations in this proceeding, the points raised by these parties on this issue are outside the purview of this decision.

In its exceptions, these parties also contended that in several vital respects the hearing and the recommended decision disregarded certain minimal elements of procedural due process. Specific reference was made to alleged deficiencies in the initiation and scope of the proceeding, the conduct of the hearing, and the recommended decision.

The several points relating to the recommended decision have been dealt with in the findings and conclusions of this decision. With respect to the other alleged deficiencies, it is concluded that the procedures for the initiation and conduct of the hearing were carried out in accordance with the Agricultural Marketing Agreement Act, the Federal Administrative Procedure Act, and the Department's General Regulations (7 CFR Part 900) that set forth the rules of practice and procedure governing pro-

ceedings to formulate marketing agreements and marketing orders.

Marketing Agreement and Order

Annexed hereto and made a part hereof are two documents, a MARKETING AGREEMENT regulating the handling of milk, and an ORDER amending and merging the orders regulating the handling of milk in the aforesaid specified marketing areas, which have been decided upon as the detailed and appropriate means of effectuating the aforegoing conclusions.

It is hereby ordered, That this entire decision, except the attached marketing agreement be published in the Federal Register. The regulatory provisions of the marketing agreement are identical with those contained in the orders as hereby proposed to be amended by the attached order which is published with this decision.

Referendum Order To Determine Producer Approval; Determination of Representative Period; and Designation of Referendum Agent

It is hereby directed that a referendum be conducted and completed on or before the 30th day from the date this decision is issued, in accordance with the procedure for the conduct of referenda (7 CFR 900.300 *et seq.*), to determine whether the issuance of the attached order (except for the proposed Advertising and Promotion Program) amending and merging the aforesaid orders regulating the handling of milk in the aforesaid specified marketing areas is approved or favored by producers, as defined under the terms of the attached order, who during the representative period were engaged in the production of milk for sale within the marketing area defined in the attached order.

It is hereby further directed that a separate referendum be conducted and completed on or before the 30th day from the date this decision is issued, in accordance with the procedure for the conduct of referenda (7 CFR 900.300 *et seq.*), to determine whether the proposed order provisions constituting the Advertising and Promotion Program in the attached order are separately approved or favored by the producers, as defined under the terms of the attached order, who during the representative period were engaged in the production of milk for sale within the marketing area defined in the attached order.

The representative period for the conduct of these referenda is hereby determined to be January 1975.

The agent of the Secretary to conduct these referenda is hereby designated to be Chapman E. Dunham.

Signed at Washington, D.C., on May 2, 1975.

RICHARD L. FELTNER,
Assistant Secretary.

ORDER[1] AMENDING AND MERGING THE ORDERS, REGULATING THE HANDLING OF MILK IN THE NORTH TEXAS, SOUTH TEXAS, SAN ANTONIO, CENTRAL WEST TEXAS, AUSTIN-WACO, AND CORPUS CHRISTI MARKETING AREAS

FINDINGS AND DETERMINATIONS

The findings and determinations hereinafter set forth are supplementary and in addition to the findings and determinations previously made in connection with the issuance of each of the aforesaid orders and of the previously issued amendments thereto; and all of said previous

1. This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

(a) *Findings.* A public hearing was held upon certain proposed amendments to the tentative marketing agreements and to the orders regulating the handling of milk in the aforesaid marketing areas. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), and the applicable rules of practice and procedure (7 CFR Part 900).

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The Texas order, which amends and merges the aforesaid orders, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the Texas marketing area, and the minimum prices specified in the Texas order are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest;

(3) The Texas order regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, the marketing agreements upon which a hearing has been held;

(4) All milk and milk products handled by handlers, as defined in the Texas order, are in the current of inter-

state commerce or directly burden, obstruct, or affect interstate commerce in milk or its products; and

(5) It is hereby found that the necessary expense of the market administrator for the maintenance and functioning of such agency will require the payment by each handler, as his pro rata share of such expense, 4 cents per hundredweight, or such lesser amount as the Secretary may prescribe, with respect to milk specified in § 1126.85 of the attached order.

Order relative to handling. It is therefore ordered that on and after the effective date hereof the orders regulating the handling of milk in the North Texas, South Texas, San Antonio, Central West Texas, Austin-Waco, and Corpus Christi marketing areas (Parts 1126, 1121, 1127, 1128, 1129, and 1130, respectively) shall be amended and merged into one order. Parts 1121, 1127, 1128, 1129, and 1130 are thereby superseded, and such vacated part designations shall be reserved for future assignment. The handling of milk in the merged marketing area, to be designated as the "Texas Marketing Area" (Part 1126), shall be in conformity to and in compliance with the terms and conditions of the following attached order:

The provisions of the proposed marketing agreement and order amending and merging the aforesaid orders, as contained in the recommended decision issued by the Acting Administrator on November 27, 1974, and published in the FEDERAL REGISTER on December 9, 1974 (39 FR 43000; FR Doc. 74-28295), shall be and are the terms and provisions of this order and are set forth in full herein, subject to the following modifications:

Changes are made in §§ 1126.7(c) and (d)(1), 1126.8(c), 1126.12(b)(5), 1126.13(c), 1126.42(e), 1126.43 (introductory paragraph), 1126.43(a), 1126.44 (introduc-

tory paragraph), 1126.44(a)(9), 1126.52(a) and (b)(1), 1126.60(a), (c), and (g), 1126.70, 1126.71, 1126.73, 1126.75(a), 1126.76(b)(iii) (introductory paragraph), 1126.78 (introductory paragraph), 1126.85 (introductory paragraph), and 1126.85(a).

(Here follow the provisions of the proposed order. See Appendix F for the order's provisions.)

APPENDIX F

CHAPTER X—AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; MILK), DEPARTMENT OF AGRICULTURE

[Milk Order No. 126]

PART 1126—MILK IN THE TEXAS MARKETING AREA

ORDER AMENDING AND MERGING ORDERS

7 CFR part	Marketing Area	Docket No.
1121	South Texas	AO-364-A8.
1126	North Texas	AO-231-A41.
1127	San Antonio, Texas	AO-232-A27.
1128	Central West Texas	AO-238-A30.
1129	Austin-Waco, Texas	AO-256-A23.
1130	Corpus-Christi, Texas	AO-259-A27.

Findings and Determinations

The findings and determinations hereinafter set forth are supplementary and in addition to the findings and determinations previously made in connection with the issuance of each of the aforesaid orders and of the previously issued amendments thereto; and all of said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

(a) *Findings.* A public hearing was held upon certain proposed amendments to the tentative marketing agreements and to the orders regulating the handling of milk

in the aforesaid marketing areas. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), and the applicable rules of practice and procedure (7 CFR Part 900).

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The Texas order, which amends and merges the aforesaid orders, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the Texas marketing area, and the minimum prices specified in the Texas order are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest;

(3) The Texas order regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, the marketing agreements upon which a hearing has been held;

(4) All milk and milk products handled by handlers, as defined in the Texas order, are in the current of interstate commerce or directly burden, obstruct, or affect interstate commerce in milk or its products; and

(5) It is hereby found that the necessary expense of the market administrator for the maintenance and functioning of such agency will require the payment by each handler, as his pro rata share of such expense, 4 cents per hundredweight, or such lesser amount as the Secretary

may prescribe, with respect to milk specified in § 1126.85 of the attached order.

(b) *Determinations.* It is hereby determined that:

(1) The refusal or failure of handlers (excluding cooperative associations specified in section 8c (9) of the Act) of more than 50 percent of the milk, which is marketed within the Texas marketing area, to sign a proposed marketing agreement, tends to prevent the effectuation of the declared policy of the Act;

(2) The issuance of the Texas order, which amends and merges the aforesaid orders, is the only practical means pursuant to the declared policy of the Act of advancing the interests of producers as defined in the Texas order;

(3) The issuance of the Texas order (exclusive of the Advertising and Promotion Program) is approved or favored by at least two-thirds of the producers who participated in a referendum and who during the determined representative period were engaged in the production of milk for sale in the Texas marketing area; and

(4) The issuance of the provisions constituting the Advertising and Promotion Program under the Texas order is approved or favored by at least two-thirds of the producers who participated in a separate referendum and who during the determined representative period were engaged in the production of milk for sale in the Texas marketing area.

Order relative to handling. It is therefore ordered that on and after the effective date hereof the orders regulating the handling of milk in the North Texas, South Texas, San Antonio, Central West Texas, Austin-Waco, and Corpus Christi marketing areas (Parts 1126, 1121, 1127, 1128, 1129, and 1130, respectively) shall be amended and

merged into one order. Parts 1121, 1127, 1128, 1129, and 1130 are thereby superseded, and such vacated part designations shall be reserved for future assignment. The handling of milk in the merged marketing area, to be designated as the "Texas Marketing Area" (Part 1126), shall be in the conformity to and in compliance with the terms and conditions of the following attached order:

PART 1126—MILK IN THE TEXAS MARKETING AREA

Subpart—Order Regulating Handling

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1126.50 Class prices.
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ADVERTISING AND PROMOTION PROGRAM

1126.110 Agency.
1126.111 Composition of Agency.
1126.112 Term of office.
1126.113 Selection of Agency members.
1126.114 Agency operating procedure.
1126.115 Powers of the Agency.
1126.116 Duties of the Agency.
1126.117 Advertising, Research, Education and Promotion Program.
1126.118 Limitation of expenditures by the Agency.
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1126.121 Duties of the market administrator.

1126.122 Liquidation.

1126.123 Initial operating procedures under merger of orders.

AUTHORITY: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

GENERAL PROVISIONS

§ 1126.1 General provisions.

The terms, definitions, and provisions in Part 1000 of this chapter are hereby incorporated by reference and made a part of this order.

DEFINITIONS

§ 1126.2 Texas marketing area.

The "Texas marketing area," hereinafter called the "marketing area," means all territory within the boundaries of the following Texas counties, including all piers, docks, and wharves connected therewith and all craft moored thereat, and all territory occupied by government (municipal, State, or Federal) reservations, installations, institutions, or other similar establishments if any part thereof is within any of the listed counties:

ZONE 1

Camp.
Collin.
Cooke.
Dallas.
Delta.
Denton.
Ellis.
Fannin.
Johnson.
Kaufman.
Lamar.
Morris.
Parker.
Rains.
Red River.
Rockwall.

Franklin.
Grayson.
Hill (Blum and Itasca divisions only).
Hood.
Hopkins.
Hunt.
Somervell.
Tarrant.
Titus.
Upshur.
Van Zandt.
Wise.
Wood.

ZONE 2

Gregg.
Harrison.
Marion.
Panola.
Rusk.
Smith.

ZONE 3

Anderson.
Bell.
Bosque.
Cherokee.
Comanche.
Coryell.
Erath.
Falls.
Freestone.
Hamilton.
Henderson.
Hill (except Blum and Itasca divisions).
Lampasas.
Limestone.
McLennan
Mills.
Navarro.

ZONE 4

Angelina.
Houston.
Jasper.
Leon.
Nacogdoches.
Newton.
Polk.
Sabine.
San Augustine.
Shelby.
Trinity.
Tyler.

ZONE 5

Brazos.
Robertson.
Burleson.
Grimes.
Madison.
Milam.
Walker.

ZONE 6

Andrews.
Borden.
Brown.
Callahan.
Coke.
Coleman.
Dawson.
Eastland.
Ector.
Fisher.
Foard.
Glasscock.
Haskell.
Howard.
Jack.
Jones.
Kent.
King.
Knox.
Martin.
Midland.
Mitchell.
Nolan.
Palo Pinto.
Runnels.
Scurry.
Shackelford.
Stephens.
Sterling.
Stonewall.
Tayler.
Throckmorton.
Tom Green.
Young.

ZONE 7

Bastrop.
Burnet.
Lee.
Travis.
Williamson.

ZONE 8

Austin.
Brazoria.
Chambers.
Harris.
Jefferson.
Liberty.

Colorado.
Fayette.
Fort Bend.
Galveston.
Hardin.
Montgomery.
Orange.
San Jacinto.
Waller.
Washington.

ZONE 9

Bexar.
Caldwell.
Comal.
DeWitt.
Gonzales.
Guadalupe.
Hays.
Jackson.
Lavaca.
Matagorda.
Wharton.
Wilson.

ZONE 10

Aransas.
Bee.
Calhoun.
Goliad.
Karnes.
Live Oak.
Refugio.
Victoria.

ZONE 11

Brooks.
Duval.
Jim Wells.
Kenedy.
Kleberg.
Nueces.
San Patricio.

ZONE 12

Cameron.
Hidalgo.
Willacy.

§ 1126.3 Route disposition.

"Route disposition" means any delivery (including any delivery by a vendor or disposition at a plant store) of a fluid milk product classified as Class I milk, other than a delivery to a plant.

§ 1126.4 Plant.

"Plant" means the land, buildings, facilities, and equipment constituting a single operating unit or establishment at which milk or milk products (including filled milk) are received, processed, or packaged. Separate facilities without stationary storage tanks which are used only as a reload point for transferring bulk milk from one tank truck to another or separate facilities used only as a distribution point for storing packaged fluid milk products in transit for route disposition shall not be a plant under this definition.

§ 1126.5 [Reserved]

§ 1126.6 [Reserved]

§ 1126.7 Pool plant.

Except as provided in paragraph (f) of this section, "pool plant" means:

(a) Any plant that is approved by a duly constituted regulatory agency for the processing or packaging of Grade A milk and from which during the month there is:

(1) Route disposition, except filled milk in the marketing area equal to 10 percent or more of the receipts of Grade A fluid milk products at such plant, including producer milk diverted from the plant; and

(2) Total route disposition, except filled milk, equal to 50 percent or more of the receipts of Grade A fluid milk products at such plant, including producer milk diverted from the plant. If two plants operated by the same handler each meet the performance requirement of paragraph (a)(1) of this section and such handler requests that the two plants be considered together for the purpose of meeting the total route disposition requirement, each such plant

shall be deemed to have met the total disposition requirement of this subparagraph if the combined route disposition, except filled milk, of such plants is 50 percent or more of the combined receipts of Grade A fluid milk products at such plants, including producer milk diverted from the plants.

(b) Any plant, other than a plant described in paragraph (a) of this section, that is approved by a duly constituted regulatory agency for the disposition of Grade A milk in the marketing area and from which during the month 50 percent or more of the receipts at such plant of Grade A milk from dairy farmers (including producer milk diverted from the plant but excluding milk received as diverted milk) and handlers described in § 1126.9(c) is transferred in the form of a bulk fluid milk product, except filled milk, to pool plants described in pargraph (a) of this section, except that such percentage shall be 15 percent for the months of:

(1) August, if the plant was a pool plant under this paragraph or paragraph (d) of this section during the immediately preceding month of July; and

(2) December, if the plant was a pool plant under this paragraph during the immediately preceding month of November.

(c) Any plant, other than a plant described in paragraph (a) or (b) of this section or that qualifies as a pool plant under another Federal order, from which during the month 50 percent or more of the receipts as such plant of Grade A milk from dairy farmers (including milk diverted from the plant but excluding milk received as diverted milk) and handlers described in § 1126.9(c) is transferred in the form of a bulk fluid milk product, except filled milk, to pool plants described in paragraph (a) of this section and distributing plants fully regulated under other Federal

orders, if the total quality so transferred to pool plants exceeds in the case of each other order the total quantity so transferred to other order distributing plants, except that:

(1) For the following months, such percentage shall be 15 percent and shall apply only to transfers to pool plants described in paragraph (a) of this section:

(i) August, if the plant was a pool plant under this paragraph or paragraph (d) of this section during the immediately preceding month of July; and

(ii) December, if the plant was a pool plant under this paragraph during the immediately preceding month of November; and

(2) Such plant shall not be a pool plant under this paragraph in any of the months of February through July unless it was a pool plant under this paragraph in three or more of the immediately preceding months of September through January.

(d) Any plant during the months of February through July, other than a plant described in paragraph (a) of this section, that was a pool plant under paragraph (b) or (c) of this section during each of the immediately preceding months of September through January and is approved by a duly constituted regulatory agency for the disposition of Grade A milk in the marketing area, subject to the following conditions:

(1) For the months of February through July 1975, the required qualification under paragraph (b) of this section in prior months shall be deemed to have been met if the plant was a pool supply plant under the Austin-Waco, West Texas, Corpus Christi, North Texas, San Antonio, or South Texas orders (or any combination thereof) during the months of September, October, and November 1974; and

(2) If the plant operator files with the market administrator prior to any of the months of February through July a written request for nonpool status, a plant shall not be a pool plant under this paragraph during any of such remaining months through July.

(e) Any plant located in the marketing area that is operated by a cooperative association if pool plant status under this paragraph is requested for such plant by the cooperative association and 60 percent or more of the producer milk of members of the cooperative association (excluding such milk that is received at or diverted from pool plants described in paragraphs (b), (c) and (d) of this section) is physically received during the month in the form of a bulk fluid milk product at pool plants described in paragraph (a) of this section either directly from farms or by transfer from plants of the cooperative association for which pool plant status under this paragraph has been requested, subject to the following conditions:

(1) The plant does not qualify as a pool plant under paragraph (a), (b), (c) or (d) of this section or under the provisions of another Federal order applicable to a distributing plant or a supply plant; and

(2) The plant is approved by a duly constituted regulatory agency for the disposition of Grade A milk in the marketing area.

(f) The term "pool plant" shall not apply to the following plants:

(1) A producer-handler plant;

(2) A governmental agency plant;

(3) A plant qualified pursuant to paragraph (a) of this section which also meets the pooling requirements of another Federal order and from which there is a greater

quantity of route disposition, except filled milk, during the month in such other Federal order marketing area than in this marketing area, except that if such plant was subject to all the provisions of this part in the immediately preceding month, it shall continue to be subject to all the provisions of this part until the third consecutive month in which a greater proportion of its route disposition, except filled milk, is made in such other marketing area;

(4) A plant qualified pursuant to paragraph (a) of this section which also meets the pooling requirements of another Federal order on the basis of route disposition in such other marketing area and from which there is a greater quantity of route disposition, except filled milk, in this marketing area than in such other marketing area but which plant is, nevertheless, fully regulated under such other Federal order; and

(5) A plant qualified pursuant to paragraph (b) or (c) of this section which has automatic pooling status under another Federal order.

§ 1126.8 Nonpool plant.

"Nonpool plant" means any milk or filled milk receiving, manufacturing, or processing plant other than a pool plant. The following categories of nonpool plants are further defined as follows:

(a) "Other order plant" means a plant that is fully subject to the pricing and pooling provisions of another order issued pursuant to the Act.

(b) "Producer-handler plant" means a plant operated by a producer-handler as defined in any order (including this part) issued pursuant to the Act.

(c) "Partially regulated distributing plant" means a nonpool plant that is not another order plant, a govern-

mental agency plant, or a producer-handler plant and from which there is route disposition in consumer-type packages or dispenser units in the marketing area during the month.

(d) "Unregulated supply plant" means a nonpool plant from which fluid milk products are moved to a pool plant during the month but which is not another order plant, a governmental agency plant, or a producer-handler plant.

(e) "Governmental agency plant" means a plant operated by a governmental agency from which fluid milk products are distributed in the marketing area. Such plant shall be exempt from all provisions of this part.

§ 1126.9 Handler.

"Handler" means:

(a) Any person in his capacity as the operator of a pool plant;

(b) Any cooperative association with respect to milk of a producer that is diverted for the account of the cooperative association from a pool plant of another handler in accordance with § 1126.13;

(c) Any cooperative association with respect to milk that it receives for its account from the farm of a producer for delivery to a pool plant of another handler in a tank truck owned and operated by, or under the control of, such cooperative association, unless both the cooperative association and the operator of the pool plant notify the market administrator prior to the time that such milk is delivered to the pool plant that the plant operator will be the handler for such milk and will purchase such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples. Milk for which the cooperative associa-

tion is the handler pursuant to this paragraph shall be deemed to have been received by the cooperative association at the location of the pool plant to which such milk is delivered;

(d) Any person in his capacity as the operator of a partially regulated distributing plant;

(e) Any person who is a producer-handler; and

(f) Any person in his capacity as the operator of another order plant described in § 1126.7(f).

§ 1126.10 Producer-handler.

"Producer-handler" means any person:

(a) Who operates a dairy farm and a processing plant from which there is route disposition in the marketing area;

(b) Who receives no fluid milk products from sources other than his own farm production and pool plants;

(c) Whose receipts of fluid milk products during the month from pool plants do not exceed the lesser of 5 percent of his Class I disposition during the month or 10,000 pounds;

(d) Who disposes of no other source milk as Class I milk except by increasing the nonfat milk solids content of the fluid milk products received from his own farm production or pool plants; and

(e) Who provides proof satisfactory to the market administrator that the care and management of the dairy farm and other resources necessary for his own farm production of milk and the management and operation of the processing plant are the personal enterprise and risk of such person.

§ 1126.11 [Reserved]

§ 1126.12 Producer.

(a) Except as provided in paragraph (b) of this section, "producer" means any person who produces milk approved by a duly constituted regulatory agency for disposition in the marketing area as Grade A milk and whose milk is:

(1) Received at a pool plant directly from such person;

(2) Received by a handler described in § 1126.9(c); or

(3) Diverted from a pool plant in accordance with § 1126.13.

(b) "Producer" shall not include:

(1) A producer-handler as defined in any order (including this part) issued pursuant to the Act;

(2) A governmental agency that operates a plant exempt pursuant to § 1126.8(e);

(3) Any person with respect to milk produced by him that is diverted to a pool plant from another order plant if the other order designates such person as a producer under that order and such milk is allocated to Class II or Class III utilization pursuant to § 1126.44(a)(8)(iii) and the corresponding step of § 1126.44(b);

(4) Any person with respect to milk produced by him that is reported as diverted to another order plant if any portion of such person's milk so moved is assigned to Class I under the provisions of such other order; or

(5) Any person with respect to milk produced by him during the months of February through July that

is caused to be delivered to a pool plant by a cooperative association or a pool plant operator if during the immediately preceding period of September through November milk from the same farm was caused by such cooperative association or pool plant operator to be delivered to plants as other than producer milk (except milk that is not producer milk as a result of a temporary loss of Grade A approval or the application of § 1126.13(e)(4) and (5)) unless such pool plant was a nonpool plant during any of such immediately preceding months: *Provided:* That from the effective date of this merged order through July 1975 the month immediately preceding such effective date shall be used rather than the months of September through November.

§ 1126.13 Producer milk.

"Producer milk" means the skim milk and butterfat contained in milk of a producer that is:

(a) Received at a pool plant directly from such producer by the operator of the plant;

(b) Received by a handler described in § 1126.9(c);

(c) Picked up from the producer's farm tank in a tank truck owned and operated by, or under the control of, the operator of a pool plant but which is not received at a plant until the following month. Such milk shall be considered as having been received by the handler during the month in which it is picked up at the producer's farm and shall be priced at the location of the plant where it is physically received in the following month. This paragraph shall apply in like manner to milk received by the operator of a pool plant who, in accordance with § 1126.9(c), is the handler for such milk;

(d) Diverted from a pool plant described in § 1126.7 (a) for the account of the handler operating such plant to a pool plant described in § 1126.7(b), (c), (d) or (e), except that milk diverted to a plant operated by a cooperative association may not be milk of the cooperative association's members. Milk so diverted shall be priced at the plant to which diverted; or

(e) Diverted from a pool plant described in § 1126.7 (a), (b), (c), and (d) to a nonpool plant that is not a producer-handler plant for the account of the handler operating such pool plant or a handler described in § 1126.9(b), subject to the following conditions:

(1) Milk of a dairy farmer shall not be eligible for diversion during any month unless milk of such dairy farmer was physically received as producer milk at a pool plant under this order or the Austin-Waco, Central West Texas, Corpus Christi, North Texas, San Antonio, or South Texas orders and the dairy farmer has continuously retained producer status under any of such orders since that time. If a dairy farmer loses his producer status under this order (except as a result of a temporary loss of Grade A approval), his milk shall not be eligible for diversion until milk of such dairy farmer has been physically received as producer milk at a pool plant;

(2) The total quantity of milk so diverted during the month by a cooperative association shall not exceed one-third of the producer milk that the cooperative association causes to be delivered during the month to pool plants described in § 1126.7(a), (b), (c), and (d) and that is physically received thereat;

(3) The operator of a pool plant that is not a cooperative association may divert any milk that is not under the control of a cooperative association that diverts milk

during the month pursuant to paragraph (e) (2) of this section. The total quantity of milk so diverted during the month shall not exceed one-third of the producer milk physically received at such pool plant during the month that is eligible to be diverted by the plant operator;

(4) Any milk diverted in excess of the limits prescribed in paragraph (e) (2) and (3) of this section shall not be producer milk. If the diverting handler fails to designate the dairy farmers' deliveries that are not to be producer milk no milk diverted by the handler during the month to a nonpool plant shall be producer milk;

(5) The quantity of milk diverted for the account of a cooperative association from a pool plant of another handler that would cause the pool plant to become a nonpool plant shall not be producer milk; and

(6) Diverted milk shall be priced at the location of the plant to which diverted.

§ 1126.14 Other source milk.

"Other source milk" means all skim milk and butterfat contained in or, represented by:

(a) Receipts of fluid milk products and bulk products specified in § 1126.40(b)(1) from any source other than producers, handlers described in § 1126.9(c), or pool plants;

(b) Receipts in packaged form from other plants of products specified in § 1126.40(b)(1);

(c) Products (other than fluid milk products, products specified in § 1126.40(b)(1), and products produced at the plant during the same month) from any source which are reprocessed, converted into, or combined with another product in the plant during the month; and

(d) Receipts of any milk product (other than a fluid milk product or a product specified in § 1126.40(b)(1)) for which the handler fails to establish a disposition.

§ 1126.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section, "fluid milk product" means any of the following products in fluid or frozen form:

(1) Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and milkshake and ice milk mixes containing less than 20 percent total solids, including any such products that are flavored, cultured, modified with added nonfat milk solids, concentrated (if in a consumer-type package), or reconstituted; and

(2) Any milk product not specified in paragraph (a)(1) of this section or in § 1126.40 (b) or (c)(1) (i) through (viii) if it contains by weight at least 80 percent water and 6.5 percent nonfat milk solids and less than 9 percent butterfat and 20 percent total solids.

(b) The term "fluid milk product" shall not include:

(1) Evaporated or condensed milk (plain or sweetened), evaporated or condensed skim milk (plain or sweetened), formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed glass or all-metal containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

§ 1126.16 Fluid cream product.

"Fluid cream product" means cream (other than plastic cream or frozen cream), sour cream, or a mixture (including a cultured mixture) of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

§ 1126.17 Filled milk.

"Filled milk" means any combination of nonmilk fat (or oil) with skim milk (whether fresh, cultured, reconstituted, or modified by the addition of nonfat milk solids), with or without milkfat, so that the product (including stabilizers, emulsifiers, or flavoring) resembles milk or any other fluid milk product and contains less than 6 percent nonmilk fat (or oil).

§ 1126.18 Cooperative association.

"Cooperative association" means any cooperative marketing association of producers which the Secretary determines, after application by the association:

(a) To be qualified under the provisions of the act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act"; and

(b) To have full authority in the sale of milk of its members and to be engaged in making collective sales or marketing milk or its products for its members.

§ 1126.19 Current marketing period.

For the purpose of terminating this order under § 608c(16)(B) of the Act, the term "current marketing period" shall mean the first month following the date on which the Secretary publicly announces his finding that the termination of the order is favored by such majority of producers under the order as is prescribed by the Act.

HANDLER REPORTS

§ 1126.30 Reports of receipts and utilization.

On or before the 7th day after the end of each month, each handler shall report for such month to the market administrator, in the detail and on the forms prescribed by the market administrator, as follows:

(a) Each handler, with respect to each of his pool plants, shall report the quantities of skim milk and butterfat contained in or represented by:

(1) Receipts of producer milk, including producer milk diverted by the handler from the pool plant to other plants;

(2) Receipts of milk from handlers described in § 1126.9(c);

(3) Receipts of fluid milk products and bulk fluid cream products from other pool plants;

(4) Receipts of other source milk;

(5) Inventories at the beginning and end of the month of fluid milk products and products specified in § 1126.40(b)(1); and

(6) The utilization or disposition of all milk, filled milk, and milk products required to be reported pursuant to this paragraph.

(b) Each handler operating a partially regulated distributing plant shall report with respect to such plant in the same manner as prescribed for reports required by paragraph (a) of this section. Receipts of milk that would have been producer milk if the plant had been fully regulated shall be reported in lieu of producer milk. Such report shall show also the quantity of any reconstituted skim milk in route disposition in the marketing area.

(c) Each handler described in § 1126.9(b) and (c) shall report:

(1) The quantities of all skim milk and butterfat contained in receipts of producer milk; and

(2) The utilization or disposition of such receipts.

(d) Each handler not specified in paragraphs (a) through (c) of this section shall report with respect to his receipts and utilization of milk, filled milk, and milk products in such manner as the market administrator may prescribe.

§ 1126.31 Payroll reports.

(a) On or before the 20th day after the end of each month, each handler who elects pursuant to § 1126.73(d) to pay producers shall report to the market administrator the following information with respect to the handler's partial and final payments for producer milk received during such month:

(1) The name and address of each producer;

(2) The amounts paid each producer; and

(3) The dates such payments were made.

(b) On or before the 20th day after the end of the month, each handler operating a partially regulated distributing plant who elects to make payment pursuant to § 1126.76(b) shall report to the market administrator with respect to milk received from each dairy farmer who would have been a producer if the plant had been fully regulated the following information for such month:

(1) The name and address of each dairy farmer;

(2) The total pounds of milk received from each dairy farmer;

(3) The average butterfat content of such milk;

(4) The amount and nature of any deductions, as authorized in writing by the dairy farmer, from the payment for such milk; and

(5) The rate of payment per hundredweight and the net amount paid each dairy farmer.

§ 1126.32 Other reports.

(a) On or before the 24th day of each month, each handler described in § 1126.9(a), (b), and (c), except a cooperative association with respect to producer milk for which it elects to collect payments, shall report to the market administrator the following information with respect to its receipts of milk during the first 18 days of the month:

(1) The name and address of each producer from whom milk was received;

(2) The total pounds of producer milk received from such producer;

(3) The amount and nature of any deductions, as authorized in writing by the producer, to be made from the partial payment for such milk;

(4) The total pounds of milk received from a handler described in § 1126.9(c); and

(5) The pounds of skim milk and butterfat in bulk fluid milk products received from a pool plant operated by a cooperative association.

(b) On or before the 6th day after the end of each month, each handler described in § 1126.9(a), (b), and (c) shall report to the market administrator the following information with respect to its receipts of milk during such month:

(1) The name and address of each producer from whom milk was received;

(2) The total pounds of producer milk received from such producer and its average butterfat content;

(3) Except in the case of producer milk for which a cooperative association is collecting payments, the amount and nature of any deductions, as authorized in writing by the producer, to be made from the final payment for such milk;

(4) The total pounds of skim milk and butterfat received from a handler described in § 1126.9(c); and

(5) The pounds of skim milk and butterfat in bulk fluid milk products received from a pool plant operated by a cooperative association.

(c) On or before the second day prior to the reporting dates specified in paragraphs (a) and (b) of this section, each cooperative association that operates a pool plant from which bulk fluid milk products were transferred to pool plants of other handlers within the time periods described in paragraphs (a) and (b) of this section shall report to each such pool plant operator the name and location of the transferor-plant and the total pounds and butterfat content of the bulk fluid milk products transferred from the plant.

(d) In addition to the reports required pursuant to paragraphs (a) through (c) of this section and §§ 1126.30 and 1126.31, each handler shall report such other information as the market administrator deems necessary to verify or establish such handler's obligation under the order.

Classification of Milk

§ 1126.40 Classes of utilization.

Except as provided in § 1126.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1126.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section; and

(2) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product, eggnog, yogurt, and any product containing 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, eggnog, or yogurt, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section;

(3) In bulk fluid milk products and bulk fluid cream products disposed of to any commercial food processing establishment (other than a milk or filled milk plant) at which food products (other than milk products and filled milk) are processed and from which there is no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages; and

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, and dry curd cottage cheese;

(ii) Milk shake and ice milk mixes (or bases) containing 20 percent or more total solids, frozen desserts, and frozen dessert mixes;

(iii) Any concentrated milk product in bulk, fluid form other than that specified in paragraph (c)(1)(iv) of this section;

(iv) Plastic cream, frozen cream, and anhydrous milkfat;

(v) Custards, puddings, and pancake mixes; and

(vi) Formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed glass or all-metal containers.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cheese (other than cottage cheese, lowfat cottage cheese, and dry curd cottage cheese);

(ii) Butter;

(iii) Any milk product in dry form;

(iv) Any concentrated milk product in bulk, fluid form that is used to produce a Class III product;

(v) Evaporated or condensed milk (plain or sweetened) in a consumer-type package and evaporated or condensed skim milk (plain or sweetened) in a consumer-type package; and

(vi) Any product not otherwise specified in this section;

(2) In inventory at the end of the month of fluid milk products in bulk or packaged form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products and products specified in paragraph (b)(1) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and products specified in paragraph (b)(1) of this section that are dumped by a handler if the market administrator is notified of such dumping in advance and is given the opportunity to verify such disposition;

(5) In skim milk in any modified fluid milk product that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1126.15, plus the fluid equivalent of loss of nonfat milk solids occurring in the process of modification in any case where determination of the quantity of added nonfat milk solids disposed of in such products is based upon laboratory analysis by the market administrator, such loss allowable pursuant to this subparagraph not to exceed 2 percent of the fluid equivalent of the quantity of added nonfat milk solids so determined to be added; and

(6) In shrinkage assigned pursuant to § 1126.41(a) to the receipts specified in § 1126.41(a)(2) and in shrinkage specified in § 1126.41(b) and (c).

§ 1126.41 Shrinkage.

For purposes of classifying all skim milk and butterfat to be reported by a handler pursuant to § 1126.30, the market administrator shall determine the following:

(a) The pro rata assignment of shrinkage of skim milk and butterfat, respectively, at each pool plant to the respective quantities of skim milk and butterfat:

(1) In the receipts specified in paragraph (b) (1) through (6) of this section on which shrinkage is allowed pursuant to such paragraph; and

(2) In other source milk not specified in paragraph (b) (1) through (6) of this section which was received in the form of a bulk fluid milk product or a bulk fluid cream product;

(b) The shrinkage of skim milk and butterfat, respectively, assigned pursuant to paragraph (a) of this section to the receipts specified in paragraph (a)(1) of this section that is not in excess of:

(1) Two percent of the skim milk and butterfat, respectively, in producer milk (excluding milk diverted by the plant operator to another plant);

(2) Plus 1.5 percent of the skim milk and butterfat, respectively, in milk received from a handler described in § 1126.9(c) and in milk diverted to such plant from another pool plant, except that, in either face, if the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this subparagraph shall be 2 percent;

(3) Plus 0.5 percent of the skim milk and butterfat, respectively, in producer milk diverted from such plant by the plant operator to another plant, except that if the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this subparagraph shall be zero;

(4) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received by transfer from other pool plants;

(5) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received by transfer from other order plants, excluding the quantity for which Class II or Class III classification is requested by the operators of both plants;

(6) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received from un-

regulated supply plants, excluding the quantity for which Class II or Class III classification is requested by the handler; and

(7) Less 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products transferred to other plants that is not in excess of the respective amounts of skim milk and butterfat to which percentages are applied in paragraph (b) (1), (2), (4), (5), and (6) of this section; and

(c) The quantity of skim milk and butterfat, respectively, in shrinkage of milk from producers for which a cooperative association is the handler pursuant to § 1126.9 (b) or (c), but not in excess of 0.5 percent of the skim milk and butterfat, respectively, in such milk. If the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph for the cooperative association shall be zero.

§ 1126.42 Classification of transfers and diversions.

(a) *Transfers and diversions to pool plants.* Skim milk or butterfat transferred or diverted in the form of a fluid milk product or a bulk fluid cream product from a pool plant to another pool plant shall be classified as Class I milk unless both handlers request the same classification in another class. In either case, the classification of such transfers or diversions shall be subject to the following conditions:

(1) The skim milk or butterfat classified in each class shall be limited to the amount of skim milk and butterfat, respectively, remaining in such class at the transferee-plant or divertee-plant after the computations

pursuant to § 1126.44 (a) (12) and the corresponding step of § 1126.44(b);

(2) If the transferor-plant or divertor-plant received during the month other source milk to be allocated pursuant to § 1126.44(a)(7) or the corresponding step of § 1126.44(b), the skim milk or butterfat so transferred or diverted shall be classified so as to allocate the least possible Class I utilization to such other source milk; and

(3) If the transferor-handler or divertor-handler received during the month other source milk to be allocated pursuant to § 1126.44(a)(11) or (12) or the corresponding steps of § 1126.44(b), the skim milk or butterfat so transferred or diverted, up to the total of the skim milk and butterfat, respectively, in such receipts of other source milk, shall not be classified as Class I milk to a greater extent than would be the case if the other source milk had been received at the transferee-plant or divertee-plant.

(b) *Transfers and diversions to other order plants.* Skim milk or butterfat transferred or diverted in the form of a fluid milk product or a bulk fluid cream product from a pool plant to another order plant shall be classified in the following manner. Such classification shall apply only to the skim milk or butterfat that is in excess of any receipts at the pool plant from the other order plant of skim milk and butterfat, respectively, in fluid milk products and bulk fluid cream products, respectively, that are in the same category as described in paragraph (b) (1), (2), or (3) of this section:

(1) If transferred as packaged fluid milk products, classification shall be in the classes to which allocated as a fluid milk product under the other order;

(2) If transferred in bulk form, classification shall be in the classes to which allocated under the other order

(including allocation under the conditions set forth in paragraph (b) (3) of this section);

(3) If the operators of both plants so request in their reports of receipts and utilization filed with their respective market administrators, transfers or diversions in bulk form shall be classified as Class II or Class III milk to the extent of such utilization available for such classification pursuant to the allocation provisions of the other order;

(4) If information concerning the classes to which such transfers or diversions were allocated under the other order is not available to the market administrator for the purpose of establishing classification under this paragraph classification shall be as Class I, subject to adjustment when such information is available;

(5) For purposes of this paragraph, if the other order provides for a different number of classes of utilization than is provided for under this part, skim milk or butterfat allocated to a class consisting primarily of fluid milk products shall be classified as Class I milk, and skim milk or butterfat allocated to the other classes shall be classified as Class III milk; and

(6) If the form in which any fluid milk product that is transferred to another order plant is not defined as a fluid milk product under such other order, classification under this paragraph shall be in accordance with the provisions of § 1126.40.

(c) *Transfers to producer-handlers and transfers and diversions to governmental agency plants.* Skim milk or butterfat transferred in the following forms from a pool to a producer-handler under this or any other Federal order or transferred or diverted from a pool plant to a governmental agency plant shall be classified:

(1) As Class I milk, if so moved in the form of a fluid milk product; and

(2) In accordance with the utilization assigned to it by the market administrator, if transferred in the form of a bulk fluid cream product. For this purpose, the transferee's utilization of skim milk and butterfat in each class, in series beginning with Class III, shall be assigned to the extent possible to its receipts of skim milk and butterfat, respectively, in bulk fluid cream products, pro rata to each source.

(d) *Transfers and diversions to other nonpool plants.* Skim milk or butterfat transferred or diverted in the following forms from a pool plant to a nonpool plant that is not another order plant, a producer-handler plant, or a governmental agency plant shall be classified:

(1) As Class I milk, if transferred in the form of a packaged fluid milk product; and

(2) As Class I milk, if transferred or diverted in the form of a bulk fluid milk product or a bulk fluid cream product, unless the following conditions apply:

(i) If the conditions described in paragraph (d)(2)(i) (*a*) and (*b*) of this section are met, transfers or diversions in bulk form shall be classified on the basis of the assignment of the nonpool plant's utilization to its receipts as set forth in paragraph (d)(2)(ii) through (viii) of this section:

(*a*) The transferor-handler or divertor-handler claims such classification in his report of receipts and utilization filed pursuant to § 1126.30 for the month within which such transaction occurred; and

(*b*) The nonpool plant operator maintains books and records showing the utilization of all skim milk and butter-

fat received at such plant which are made available for verification purposes if requested by the market administrator;

(ii) Route disposition in the marketing area of each Federal milk order from the nonpool plant and transfers of packaged fluid milk products from such nonpool plant to plants fully regulated thereunder shall be assigned to the extent possible in the following sequence;

(*a*) Pro rata to receipts of packaged fluid milk products at such nonpool plant from pool plants;

(*b*) Pro rata to any remaining unassigned receipts of packaged fluid milk products at such nonpool plant from other order plants;

(*c*) Pro rata to receipts of bulk fluid milk products at such nonpool plant from pool plants; and

(*d*) Pro rata to any remaining unassigned receipts of bulk fluid products at such nonpool plant from other order plants;

(iii) Any remaining Class I disposition of packaged fluid milk products from the nonpool plant shall be assigned to the extent possible pro rata to any remaining unassigned receipts of packaged fluid milk products at such nonpool plant from pool plants and other order plants;

(iv) Transfers of bulk fluid milk products from the nonpool plant to a plant fully regulated under any Federal milk order, to the extent that such transfers to the regulated plant exceed receipts of fluid milk products from such plant and are allocated to Class I at the transferee-plant, shall be assigned to the extent possible in the following sequence:

(*a*) Pro rata to receipts of fluid milk products at such nonpool plant from pool plants; and

(b) Pro rata to any remaining unassigned receipts of fluid milk products at such nonpool plant from other order plants;

(v) Any remaining unassigned Class I disposition from the nonpool plant shall be assigned to the extent possible in the following sequence:

(a) To such nonpool plant's receipts from dairy farmers who the market administrator determines constitute regular sources of Grade A milk for such nonpool plant; and

(b) To such nonpool plant's receipts of Grade A milk from plants not fully regulated under any Federal milk order which the market administrator determines constitute regular sources of Grade A milk for such nonpool plant;

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class III utilization, and then to Class II utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class III utilization, then to any remaining Class II utilization, and then to Class I utilization at such nonpool plant; and

(viii) In determining the nonpool plant's utilization for purposes of this subparagraph, any fluid milk products and bulk fluid cream products transferred from such nonpool plant to a plant not fully regulated under any Federal milk order shall be classified on the basis of the second

plant's utilization using the same assignment priorities at the second plant that are set forth in this subparagraph.

(e) *Transfers by a handler described in § 1126.9(c) to pool plants.* Skim milk and butterfat transferred in the form of bulk milk by a handler described in § 1126.9(c) to another handler's pool plant shall be classified pursuant to § 1126.44 pro rata with producer milk received at the transferee-handler's plant.

§ 1126.43 General classification rules.

In determining the classification of producer milk, the following rules shall apply:

(a) Each month the market administrator shall correct for mathematical and other obvious errors all reports filed pursuant to § 1126.30 and shall compute separately for each pool plant, and for each cooperative association with respect to milk for which it is the handler pursuant to § 1126.9 (b) or (c) that was not received at a pool plant, the pounds of skim milk and butterfat, respectively, in each class in accordance with §§ 1126.40, 1126.41 and 1126.42. The combined pounds of skim milk and butterfat so determined in each class for a handler described in § 1126.9 (b) or (c) shall be such handler's classification of producer milk;

(b) If any of the water contained in the milk from which a product is made is removed before the product is utilized or disposed of by a handler, the pounds of skim milk in such product that are to be considered under this part as used or disposed of by the handler shall be an amount equivalent to the nonfat milk solids contained in such product plus all of the water originally associated with such solids; and

(c) The classification of producer milk for which a cooperative association is the handler pursuant to § 1126.9

(b) or (c) shall be determined separately from the operations of any pool plant operated by such cooperative association.

§ 1126.44 Classification of producer milk.

For each month the market administrator shall determine for each handler described in § 1126.9(a) for each of his pool plants separately the classification of producer milk and milk received from a handler described in § 1126.9 (c), by allocating the handler's receipts of skim milk and butterfat to his utilization as follows:

(a) Skim milk shall be allocated in the following manner:

(1) Subtract from the total pounds of skim milk in Class III the pounds of skim milk in shrinkage specified in § 1126.41(b);

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(3) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in fluid milk products received in packaged form from another order plant except that to be subtracted pursuant to paragraph (a) (7) (vi) of this section, as follows:

(i) From Class III milk, the lesser of the pounds remaining or 2 percent of such receipts; and

(ii) From Class I milk, the remainder of such receipts;

(4) Subtract from the pounds of skim milk in Class II the pounds of skim milk in products specified in § 1126.40 (b) (1) that were received in packaged form from other plants, but not in excess of the pounds of skim milk remaining in Class II;

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1126.40(b) (1) that were in inventory at the beginning of the month in packaged form, but not in excess of the pounds of skim milk remaining in Class II. This subparagraph shall apply only if the pool plant was subject to the provisions of this subparagraph or comparable provisions of another Federal milk order in the immediately preceding month;

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in other source milk (except that received in the form of a fluid milk product or a fluid cream product) that is used to produce, or added to, any product specified in § 1126.40(b), but not in excess of the pounds of skim milk remaining in Class II;

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in each of the following:

(i) Other source milk (except that received in the form of a fluid milk product) and, if paragraph (a) (5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1126.40(b) (1) that was not subtracted pursuant to paragraph (a) (4), (5), and (6) of this section;

(ii) Receipts of fluid milk products (except filled milk) for which Grade A certification is not established;

(iii) Receipts of fluid milk products from unidentified sources;

(iv) Receipts of fluid milk products from a producer-handler as defined under this or any other Federal milk order and from a governmental agency plant;

(v) Receipts of reconstituted skim milk in filled milk from an unregulated supply plant that were not subtracted pursuant to paragraph (a)(2) of this section;

(vi) Receipts of reconstituted skim milk in filled milk from another order plant that is regulated under any Federal milk order providing for individual-handler pooling, to the extent that reconstituted skim milk is allocated to Class I at the transferor-plant; and

(vii) Receipts of fluid milk products from a person described in § 1126.12(b)(5);

(8) Subtract in the order specified below from the pounds of skim milk remaining in Class II and Class III, in sequence beginning with Class III:

(i) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraph (a)(2) and (7)(v) of this section for which the handler requests a classification other than Class I, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(ii) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraph (a)(2), (7)(v), and (8)(i) of this section which are in excess of the pounds of skim milk determined pursuant to paragraph (a)(8)(ii) (*a*) through (*c*) of this section. Should the pounds of skim milk to be subtracted from Class II and Class III combined exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available

utilization in such classes at the nearest other pool plant of the handler and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount:

(*a*) Multiply by 1.25 the sum of the pounds of skim milk remaining in Class I at this allocation step at all pool plants of the handler (excluding any duplication of Class I utilization resulting from reported Class I transfers between pool plants of the handler);

(*b*) Subtract from the above result the sum of the pounds of skim milk in receipts at all pool plants of the handler of producer milk, milk from a handler described in §1126.9(c), fluid milk products from pool plants of other handlers, and bulk fluid milk products from other order plants that were not subtracted pursuant to paragraph (a)(7)(vi) of this section; and

(*c*) Multiply any plus quantity resulting above by the percentage that the receipts of skim milk in fluid milk products from unregulated supply plants that remain at this pool plant is of all such receipts remaining at this allocation step at all pool plants of the handler; and

(iii) The pounds of skim milk in receipts of bulk fluid milk products from another order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraph (a)(7)(vi) of this section, if Class II or Class III classification is requested by the operator of the other order plant and the handler, but not in excess of the

pounds of skim milk remaining in Class II and Class III combined;

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1126.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraph (a)(5) and (7)(i) of this section;

(10) Add to the remaining pounds of skim milk in Class III the pounds of skim milk subtracted pursuant to paragraph (a)(1) of this section;

(11) Subject to the provisions of paragraph (a)(11)(i) and (ii) of this section, subtract from the pounds of skim milk remaining in each class at the plant, pro rata to the total pounds of skim milk remaining in Class I and in Class II and Class III combined at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler), with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, the pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraph (a)(2), (7)(v), and (8)(i) and (ii) of this section and that were not offset by transfers or diversions of fluid milk products to the same unregulated supply plant from which fluid milk products to be allocated at this step were received:

(i) Should the pounds of skim milk to be subtracted from Class II and Class III combined pursuant to this subparagraph exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as neces-

sary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(ii) Should the pounds of skim milk to be subtracted from Class I pursuant to this subparagraph exceed the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount, beginning with the nearest plant at which Class I utilization is available;

(12) Subtract in the manner specified below from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of bulk fluid milk products from another order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraph (a) (7) (vi) and (8) (iii) of this section:

(i) Subject to the provisions of paragraph (a) (12) (ii), (iii), and (iv) of this section, such subtraction shall be pro rata to the pounds of skim milk in Class I and in Class II and Class III combined, with the quantity prorated to Class II and Class III combined being sub-

tracted first from Class III and then from Class II, with respect to whichever of the following quantities represents the lower proportion of Class I milk:

(*a*) The estimated utilization of skim milk of all handlers in each class as announced for the month pursuant to § 1126.45(a); or

(*b*) The total pounds of skim milk remaining in each class at this allocation step at all pool plants of the handler (excluding any duplciation of utilization in each class resulting from transfers between pool plants of the handler);

(ii) Should the proration pursuant to paragraph (a)(12)(i) of this section result in the total pounds of skim milk at all pool plants of the handler that are to be subtracted at this allocation step from Class II and Class III combined exceeding the pounds of skim milk remaining in Class II and Class III at all such plants, the pounds of such excess shall be subtracted from the pounds of skim milk remaining in Class I after such proration at the pool plants at which such other source milk was received;

(iii) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12)(i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class II and Class III combined that exceeds the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount.

In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(iv) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12)(i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class I that exceeds the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount beginning with the nearest plant at which Class I utilization is available;

(13) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of fluid milk products and bulk fluid cream products from another pool plant according to the classification of such products pursuant to § 1126.42(a); and

(14) If the total pounds of skim milk remaining in all classes exceed the pounds of skim milk in producer milk and milk received from a handler described in § 1126.9(c), subtract such excess from the pounds of skim milk remaining in each class in series beginning with Class III. Any amount so subtracted shall be known as "overage";

(b) Butterfat shall be allocated in accordance with the procedure outlined for skim milk in paragraph (a) of this section; and

(c) The quantity of producer milk and milk received from a handler described in § 1126.9(c) in each class shall

be the combined pounds of skim milk and butterfat remaining in each class after the computations pursuant to paragraph (a) (14) of this section and the corresponding step of paragraph (b) of this section.

§ 1126.45 Market administrator's reports and announcements concerning classification.

The market administrator shall make the following reports and announcements concerning classification:

(a) Whenever required for the purpose of allocating receipts from other order plants pursuant to § 1126.44 (a)(12) and the corresponding step of § 1126.44(b), estimate and publicly announce the utilization (to the nearest whole percentage) in each class during the month of skim milk and butterfat, respectively, in producer milk of all handlers. Such estimate shall be based upon the most current available data and shall be final for such purpose.

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from another order plant, the class to which such receipts are allocated pursuant to § 1126.44 on the basis of such report, and, thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

(c) Furnish to each handler operating a pool plant who has shipped fluid milk products or bulk fluid cream products to another order plant the class to which such shipments were allocated by the market administrator of the other order on the basis of the report by the receiving handler, and, as necessary, any changes in such allocation arising from the verification of such report.

(d) On or before the 14th day after the end of each month, report to each cooperative association which so requests the amount and class utilization of milk received by each handler from producers who are members of such cooperative association. For the purpose of this report the milk so received shall be prorated to each class in the proportion that the total receipts of milk from producers by such handler were used in each class.

Class Prices

§ 1126.50 Class prices.

Subject to the provisions of § 1126.52, the class prices for the month per hundredweight of milk shall be as follows:

(a) *Class I price.* The Class I price shall be the basic formula price for the second preceding month plus $2.32.

(b) *Class II price.* The Class II price shall be the basic formula price for the month plus 10 cents.

(c) *Class III price.* The Class III price shall be the basic formula price for the month.

§ 1126.51 Basic formula price.

The "basic formula price" shall be the average price per hundredweight for manufacturing grade milk, f.o.b. plants in Minnesota and Wisconsin, as reported by the Department for the month, adjusted to a 3.5 percent butterfat basis and rounded to the nearest cent. For such adjustment, the butterfat differential (rounded to the nearest one-tenth cent) per one-tenth percent butterfat shall be 0.12 times the simple average of the wholesale selling prices (using the midpoint of any price range as one price)

of Grade A (92-score) bulk butter per pound at Chicago, as reported by the Department for the month. For the purpose of computing the Class I price, the resulting price shall be not less than $4.33.

§ 1126.52 Plant location adjustments for handlers.

(a) For milk received at a plant from producers or a handler described in § 1126.9(c) and which is classified as Class I milk without movement in bulk form or a pool distributing plant at which a higher Class I price applies, the price specified in § 1126.50(a) shall be adjusted by the amount stated in paragraph (a) (1) through (7) of this section for the location of such plant:

(1) For a plant located within one of the zones set forth in § 1126.2, the adjustment shall be as follows:

	Adjustment per hundredweight
Zone 1	No adjustment.
Zone 2	Plus 6 cents.
Zone 3	Plus 15 cents.
Zone 4	Plus 18 cents.
Zone 5	Plus 20 cents.
Zone 6	Plus 25 cents.
Zone 7	Plus 30 cents.
Zone 8	Plus 36 cents.
Zone 9	Plus 42 cents.
Zone 10	Plus 53 cents.
Zone 11	Plus 66 cents.
Zone 12	Plus 75 cents.

(2) For a plant located in any of the following Texas counties, the adjustment shall be as follows:

(i) Plus 10 cents.

Bailey.
Castro.
Cochran.
Cottle.
Crosby.
Dickens.
Floyd.
Gaines.
Garza.
Hale.
Hockley.
Lamb.
Lubbock.
Lynn.
Motley.
Parmer.
Terry.
Yoakum.

(ii) Minus 7 cents.

Armstrong.
Briscoe.
Carson.
Childress.
Collingsworth.
Dallas.
Deafsmith.
Donley.
Gray.
Hall.
Hansford.
Hartley.
Hemphill.
Hutchinson.
Lipscomb.
Moore.
Ochiltree.
Oldham.
Potter.
Randall.
Roberts.
Sherman.
Swisher.
Wheeler.

(iii) Minus 12 cents.

Archer.
Baylor.
Clay.
Hardeman.
Montague.
Wichita.
Wilbarger.

(3) For a plant located in any of the following Oklahoma counties, the adjustment shall be as follows:

(i) Minus 24 cents.

Comanche.
Cotton.
Jefferson.
Stephens.
Tillman.

(ii) Minus 27 cents.

Carter.
Love.
Marshall.

(iii) Minus 28 cents.

Beckham.
Greer.
Harmon.
Jackson.

(iv) Minus 34 cents.

Caddo.
Canadian.
Cleveland.
Garvin.
Grady.
Johnston.
Kiowa.
McCain.
Murray.
Oklahoma.
Pontotoc.
Pottawatomi.
Seminole.
Washita.

(v) Minus 44 cents.

Alfalfa.
Beaver.
Blaine.
Cimarron.
Craig.
Creek.
Custer.
Delaware.
Dewey.
Mayes.
Noble.
Nowata.
Okfuskee.
Okmulgee.
Osage.
Ottawa.
Payne.
Pawnee.

Ellis.
Garfield.
Grant.
Harper.
Kay.
Kingfisher.
Lincoln.
Logan.
Major.
Roger Mills.
Rogers.
Texas.
Tulsa.
Wagoner.
Washington.
Woods.
Woodward.

(4) For a plant located in Bowie or Cass County, Texas, or in Little River or Miller County, Arkansas, the adjustment shall be minus 9 cents;

(5) For a plant located in the States of Louisiana or New Mexico or in El Paso County, Texas, no adjustment shall apply;

(6) For a plant located in the State of Texas but outside any area described in paragraph (a)(1) through (5) of this section, the adjustment shall be the adjustment applicable at Corpus Christi, Midland, San Angelo, or San Antonio, Texas, whichever city is nearest; and

(7) For a plant located outside the areas described in paragraph (a) (1) through (6) of this section the adjustment shall be minus 1.5 cents per hundredweight for 10 miles or fraction thereof that such plant is located from the Dallas, Texas, city hall, such distance to be based on the shortest hardsurfaced highway distance as determined by the market administrator.

(b) For fluid milk products transferred in bulk from a pool plant to a pool distributing plant at which a higher Class I price applies and which are classified as Class I milk, the Class I price shall be the Class I price applicable at the location of the transferee-plant subject to a location adjustment credit for the transferor-plant

which shall be determined by the market administrator for skim milk and butterfat, respectively as follows:

(1) Subtract from the pounds of skim milk remaining in Class I at the transferee-plant after the computations pursuant to § 1126.44(a)(12) an amount equal to:

(i) 95 percent of the pounds of skim milk in receipts of milk at the transferee-plant from producers and handlers described in § 1126.9(c); and

(ii) The pounds of skim milk in receipts of packaged fluid milk products from other pool plants;

(2) Assign any remaining pounds of skim milk in Class I at the transferee-plant to the skim milk in receipts of bulk fluid milk products from other pool plants, first to the transferor-plants at which the highest Class I price applies and then to other plants in sequence beginning with the plant at which the next highest Class I price applies;

(3) Compute the total amount of location adjustment credits to be assigned to transferor-plants by multiplying the hundredweight of skim milk assigned pursuant to paragraph (b)(2) of this section to each transferor-plant at which the Class I price is lower than the Class I price at the transferee-plant by the difference in Class I prices applicable at the transferor-plant and transferee-plant, and add the resulting amounts;

(4) Assign the total amount of location adjustment credits computed pursuant to paragraph (b)(3) of this section to those transferor-plants that transferred fluid milk products containing skim milk classified as Class I milk pursuant to § 1126.42(a) and at which the applicable Class I price is less than the Class I price at the transferee-plant, in sequence beginning with the plant at which the highest Class I price applies. Subject to the availability of such

credits, the credit assigned to each plant shall be equal to the hundredweight of such Class I skim milk multiplied by the applicable adjustment rate determined pursuant to paragraph (b)(3) of this section for such plant. If the aggregate of this computation for all plants having the same adjustment rate as determined pursuant to paragraph (b)(3) of this section exceeds the credits that are available to those plants, such credits shall be prorated to the volume of skim milk in Class I transfers from such plants; and

(5) Location adjustment credit for butterfat shall be determined in accordance with the procedure outlined for skim milk in paragraph (b)(1) through (4) of this section.

(c) The Class I price applicable to other source milk shall be adjusted by the amounts set forth in paragraph (a) of this section, except that the adjusted Class I price shall not be less than the Class III price.

§ 1126.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price for the following month and the Class II and Class III prices for the preceding month.

§ 1126.54 Equivalent price.

If for any reason a price or pricing constituent required by this part for computing class prices or for other purposes is not available as prescribed in this part, the market administrator shall use a price or pricing constituent determined by the Secretary to be equivalent to the price or pricing constituent that is required.

Uniform Price

§ 1126.60 Handler's value of milk for computing uniform price.

For the purpose of computing the uniform price, the market administrator shall determine for each month the value of milk of each handler with respect to each of his pool plants and of each handler described in § 1126.9 (b) and (c) with respect to milk that was not received at a pool plant as follows:

(a) Multiply the pounds of producer milk and milk received from a handler described in § 1126.9(c) that were classified in each class pursuant to §§ 1126.43 (a) and 1126.44(c) by the applicable class prices, and add the resulting amounts;

(b) Add the amounts obtained from multiplying the pounds of overage subtracted from each class pursuant to § 1126.44(a)(14) and the corresponding step of § 1126.44 (b) by the respective class prices, as adjusted by the butterfat differential specified in § 1126.74, that are applicable at the location of the pool plant;

(c) Add the amount obtained from multiplying the difference between the Class III price for the preceding month and the Class I price applicable at the location of the pool plant or the Class II price, as the case may be, for the current month by the hundredweight of skim milk and butterfat subtracted from Class I and Class II pursuant to § 1126.44(a)(9) and the corresponding step of § 1126.44(b);

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1126.44(a)(7)(i) through (iv)

and (vii) and the corresponding step of § 1126.44(b), excluding receipts of bulk fluid cream products from another order plant;

(e) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the transferor-plant and the Class III price by the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1126.44(a)(7) (v) and (vi) and the corresponding step of § 1126.44(b);

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1126.44(a)(11) and the corresponding step of § 1126.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order; and

(g) Subtract for a handler described in § 1126.9(c) the amount obtained from multiplying the Class III price for the preceding month, as adjusted by the butterfat differential specified in § 1126.74, by the hundredweight of skim milk and butterfat contained in inventory at the beginning of the month that was delivered to another handler's pool plant during the month.

§ 1126.61 Computation of uniform price.

For each month the market administrator shall compute the uniform price per hundredweight for milk of 3.5

percent butterfat content at pool plants at which no location adjustment applies as follows:

(a) Combine into one total the values computed pursuant to § 1126.60 for all handlers who filed the reports prescribed in § 1126.30 for the month and who made the payments pursuant to § 1126.71 for the preceding month;

(b) Add not less than one-fourth of the unobligated balance in the producer-settlement fund;

(c) Add the aggregate of all minus location adjustments and subtract the aggregate of all plus location adjustments pursuant to § 1126.75;

(d) Subtract an amount computed by multiplying the total hundredweight of producer milk included pursuant to paragraph (a) of this section by 5 cents;

(e) Divide the resulting amount by the sum of the following for all handlers included in these computations:

(1) The total hundredweight of producer milk; and

(2) The total hundredweight for which a value is computed pursuant to § 1126.60(f); and

(f) Subtract not less than 4 cents nor more than 5 cents.

§ 1126.62 Announcement of uniform price and butterfat differential.

The market administrator shall announce publicly on or before:

(a) The 5th day after the end of each month the butterfat differential for such month; and

(b) The 13th day after the end of each month the uniform price for such month.

PAYMENTS FOR MILK

§ 1126.70 Producer-settlement fund.

The market administrator shall establish and maintain a separate fund known as the "producer-settlement fund," into which he shall deposit the payments made by handlers pursuant to §§ 1126.71, 1126.76, and 1126.77 and from which he shall make all payments pursuant to §§ 1126.73 (a) through (f) and 1126.77 except that payments to a cooperative association pursuant to § 1126.73(c) shall be offset by any payments due from such cooperative association pursuant to § 1126.1 that have not been received by the market administrator.

§ 1126.71 Payments to the producer-settlement fund.

(a) Subject to paragraphs (c) and (d) of this section, each handler shall pay to the market administrator on or before the 26th day of each month an amount determined by multiplying the handlers receipts during the first 18 days of such month of producer milk (excluding, in the case of a handler described in § 1126.9(c), producer milk delivered to a pool plant) and milk from a handler described in § 1126.9(c) by the Class III price for the preceding month, less:

(1) Payments made by the handler on or before such date to producers for milk received during the 18-day period; and

(2) Proper deductions authorized in writing by producers from whom the handler received milk, except that the amount deducted for each producer shall not exceed the value (at the Class III price) of the milk received from the producer during the 18-day period.

(b) Subject to paragraphs (c) and (d) of this section, each handler shall pay to the market administrator

on or before the 16th day after the end of each month an amount equal to such handler's value of milk for such month determined pursuant to § 1126.60(a), as adjusted by the butterfat differential specified in § 1126.74, and pursuant to § 1126.60(b) through (g), less:

(1) Payments made by the handler pursuant to paragraph (a) of this section for such month;

(2) Payments, other than those specified in § 1126.73 (d), that were made by the handler on or before such date to producers for milk received during such month;

(3) Proper deductions for the month that were authorized in writing by producers from whom the handler received milk, except that the amount deducted for each producer shall not exceed the value of the milk received from the producer during the month; and

(4) The value at the uniform price applicable at the location of the plant from which received plus 5 cents of other source milk for which a value was computed pursuant to § 1126.60(f).

(c) The following conditions shall apply with respect to the payments prescribed in paragraphs (a) and (b) of this section:

(1) Payments to the market administrator shall be deemed not to have been made until such payments have been received by the market administrator; and

(2) If the date by which payments must be received by the market administrator falls on Saturday or Sunday or on any Monday that is a national holiday, payments shall not be due until the next day on which the market administrator's office is open for public business.

(d) Payments due the market administrator from a cooperative association handler may be offset by payments

determined by the market administrator to be due the cooperative association pursuant to § 1126.73(c).

(e) On or before the 25th day after the end of the month, each person who operated another order plant that was regulated during such month under an order providing for individual-handler pooling shall pay to the market administrator an amount computed as follows:

(1) Determine the quantity of reconstituted skim milk in filled milk in route disposition from such plant in the marketing area which was allocated to Class I at such plant. If there is such route disposition from such plant in marketing areas regulated by two or more market-wide pool orders, the reconstituted skim milk allocated to Class I shall be prorated to each order according to such route disposition in each marketing area; and

(2) Compute the value of the reconstituted skim milk assigned in paragraph (e)(1) of this section to route disposition in this marketing area by multiplying the quantity of such skim milk by the difference between the Class I price under this part that is applicable at the location of the other order plant (but not to be less than the Class III price) and the Class III price.

§ 1126.72 [Reserved]

§ 1126.73 Payments to producers and to cooperative associations.

(a) Subject to paragraphs (c) through (f) of this section, the market administrator shall pay each producer on or before the 28th day of each month for milk for which payment pursuant to § 1126.71(a) has been received by the market administrator. Such payment shall be at a rate per hundredweight equal to the Class III price for the pre-

ceding month less the amounts specified in § 1126.71(a)(1) and (2).

(b) Subject to paragraphs (c) through (f) of this section, the market administrator shall pay each producer on or before the 18th day after the end of each month for milk for which payment pursuant to § 1126.71(b) has been received by the market administrator or offset pursuant to § 1126.71(d). Such payment shall be at the uniform price computed pursuant to § 1126.61 for the month subject to the following adjustments:

(1) Any applicable adjustments pursuant to §§ 1126.74 and 1126.75;

(2) Less the payments described in § 1126.71(b)(2) and paragraph (a) of this section;

(3) Less deductions for marketing services pursuant to § 1126.86;

(4) Less the authorized deductions specified in § 1126.71(b)(3); and

(5) Any adjustments for errors in calculating payments to an individual producer for past months.

(c) In making payments to producers pursuant to paragraphs (a) and (b) of this section, the market administrator, on or before the day prior to the dates specified in such paragraphs, shall pay to each cooperative association that so requests with respect to those producers for whom it markets milk and who are certified to the market administrator by the cooperative association as having authorized the cooperative association to receive such payment an amount equal to the sum of the individual payments otherwise due such producers pursuant to paragraphs (a) and (b) of this section.

(d) In making payments to producers pursuant to paragraphs (a) and (b) of this section, the market administrator, on or before the day prior to the dates specified in such paragraphs, shall pay to each handler who so requests for milk received by the handler from producers for when a cooperative association is not collecting payments pursuant to paragraph (c) of this section an amount equal to the sum of the individual payments otherwise due such producers pursuant to paragraphs (a) and (b) of this section. The handler then shall pay the individual producers the amounts due them by the respective dates specified in paragraphs (a) and (b) of this section. Any handler who the market administrator determines is or was delinquent with respect to any payment obligation under this order shall not be eligible to participate in this payment arrangement until the handler has met all prescribed payment obligations for three consecutive months. In making payments to producers pursuant to this paragraph, the handler shall furnish each producer the following information:

(1) The identity of the handler and the producer and the month to which the payment applies;

(2) The total pounds and, with respect to final payments, the average butterfat content of the milk for which payment is being made;

(3) The minimum rate of payment required by the order and the rate of payment used if such rate is other than the applicable minimum rate;

(4) The amount and nature of any deductions from the amount otherwise due the producer; and

(5) The net amount of payment to the producer.

(e) The following conditions shall apply with respect to the payments prescribed in paragraph (a) through (d) of this section:

(1) If the date by which such payments are to be made falls on a Saturday or Sunday or on any Monday that is a national holiday, such payments need not be made until the next day on which the market administrator's office is open for public business; and

(2) If the application of § 1126.71(c)(2) or paragraph (e)(1) of this section results in a delay in the partial or final payments by handlers to the market administrator or by the market administrator to handlers, the corresponding partial or final payments prescribed in paragraphs (a) through (d) of this section may be delayed by the same number of days.

(f) If the market administrator does not receive the full payment required of a handler pursuant to § 1126.71, he shall reduce uniformly per hundredweight the payments due producers for their milk received by such handler by a total amount not in excess of the amount due from such handler. The market administrator shall complete such payments on or before the next date for making payments pursuant to this section following the date on which the remaining payment is received from such handler.

(g) Subject to § 1126.71(c)(1) and (2), each handler who receives bulk fluid milk products from a pool plant operated by a cooperative association shall pay the following amounts for such milk to the market administrator who in turn shall transmit such money to the cooperative association:

(1) On or before the 26th day of each month, an amount determined by multiplying such receipts during the first 18 days of the month by the Class III price for the preceding month, as adjusted by the butterfat differential specified in § 1126.74 for the preceding month; and

(2) On or before the 16th day after the end of each month, an amount determined by multiplying the quantity

of such receipts during the month that was classified in each class pursuant to § 1126.42(a) by the applicable class price, as adjusted by the butterfat differential specified in § 1126.74, less any payment made by the handler pursuant to paragraph (g)(1) of this section for such month. For the purpose of such computation, the applicable Class I price shall be the higher of the Class I prices applicable at the transferee-plant and the transferor-plant.

§ 1126.74 Butterfat differential.

For milk containing more or less than 3.5 percent butterfat, the uniform price shall be increased or decreased, respectively, for each one-tenth percent butterfat variation from 3.5 percent by a butterfat differential, rounded to the nearest one-tenth cent, which shall be 0.115 times the simple average of the wholesale selling prices (using the midpoint of any price range as one price) of Grade A (92-score) bulk butter per pound at Chicago, as reported by the Department for the month.

§ 1126.75 Plant location adustments for producers and on nonpool milk.

(a) In making the payments required pursuant to § 1126.73, the uniform price computed pursuant to § 1126.61 for the month shall be adjusted by the amounts set forth in § 1126.52 according to the location of the plant where the milk being priced was received.

(b) For purposes of computing the value of other source milk pursuant to § 1126.71, the uniform price shall be adjusted by the amount set forth in § 1126.52 that is applicable at the location of the nonpool plant from which the milk was received, except that the adjusted uniform price plus 5 cents shall not be less than the Class III price.

§ 1126.76 Payments by handler operating a partially regulated distributing plant.

Each handler who operates a partially regulated distributing plant shall pay on or before the 25th day after the end of the month to the market administrator for the producer-settlement fund the amount computed pursuant to paragraph (a) of this section. If the handler submits pursuant to §§ 1126.30(b) and 1126.31(b) the information necessary for making the computations, such handler may elect to pay in lieu of such payment the amount computed pursuant to paragraph (b) of this section:

(a) The payment under this paragraph shall be the amount resulting from the following computations:

(1) Determine the pounds of route disposition in the marketing area from the partially regulated distributing plant;

(2) Subtract the pounds of fluid milk products received at the partially regulated distributing plant:

(i) As Class I milk from pool plants and other order plants, except that subtracted under a similar provision of another Federal milk order; and

(ii) From another nonpool plant that is not another order plant to the extent that an equivalent amount of fluid milk products disposed of to such nonpool plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(3) Subtract the pounds of reconstituted skim milk in route disposition in the marketing area from the partially regulated distributing plant;

(4) Multiply the remaining pounds by the difference between the Class I price and the uniform price plus 5 cents, both prices to be applicable at the location of the partially regulated distributing plant (except that the Class I price and the uniform price plus 5 cents shall not be less than the Class III price); and

(5) Add the amount obtained from multiplying the pounds of reconstituted skim milk specified in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant (but not to be less than the Class III price) and the Class III price.

(b) The payment under this paragraph shall be the amount resulting from the following computations:

(1) Determine the value that would have been computed pursuant to § 1126.60 for the partially regulated distributing plant if the plant had been a pool plant, subject to the following modifications:

(i) Fluid milk products and bulk fluid cream products received at the partially regulated distributing plant from a pool plant or another order plant shall be allocated at the partially regulated distributing plant to the same class in which such products were classified at the fully regulated plant;

(ii) Fluid milk products and bulk fluid cream products transferred from the partially regulated distributing plant to a pool plant or another order plant shall be classified at the partially regulated distributing plant in the class to which allocated at the fully regulated plant. Such transfers shall be allocated to the extent possible to those receipts at the partially regulated distributing plant from pool plants and other order plants that are classified in the corresponding class pursuant to paragraph (b)(1)(i) of

this section. Any such transfers remaining after the above allocation which are classified in Class I and for which a value is computed for the handler operating the partially regulated distributing plant pursuant to § 1126.60 shall be priced at the uniform price (or at the weighed average price if such is provided) of the respective order regulating the handling of milk at the transferee-plant, with such uniform price adjusted to the location of the nonpool plant (but not to be less than the lowest class price of the respective order), except that transfers of reconstituted skim milk in filled milk shall be priced at the lowest class price of the respective order; and

(iii) If the operator of the partially regulated distributing plant so requests, the value of milk determined pursuant to § 1126.60 for such handler shall include, in lieu of the value of other source milk specified in § 1126.60(f) less the value of such other source milk specified in § 1126.71(b)(4), a value of milk determined pursuant to § 1126.60 for each nonpool plant that is not another order plant which serves as a supply plant for such partially regulated distributing plant by making shipments to the partially regulated distributing plant during the month equivalent to the requirements of § 1126.7(b) and the corresponding provisions of § 1126.7(d), subject to the following conditions:

(*a*) The operator of the partially regulated distributing plant submits with his reports filed pursuant to §§ 1126.30(b) and 1126.31(b) similar reports for each such nonpool supply plant;

(*b*) The operator of such nonpool supply plant maintains books and records showing the utilization of all skim milk and butterfat received at such plant which are made available if requested by the market administrator for verification purposes; and

(c) The value of milk determined pursuant to § 1126.60 for such nonpool supply plant shall be determined in the same manner prescribed for computing the obligation of such partially regulated distributing plant; and

(2) From the partially regulated distributing plant's value of milk computed pursuant to paragraph (b)(1) of this section, subtract:

(i) The gross payments by the operator of such partially regulated distributing plant, adjusted to a 3.5 percent butterfat basis by the butterfat differential specified in § 1126.74 for milk received at the plant during the month that would have been producer milk if the plant had been fully regulated;

(ii) If paragraph (b)(1)(iii) of this section applies, the gross payments by the operator of such nonpool supply plant, adjusted to a 3.5 percent butterfat basis by the butterfat differential specified in § 1126.74, for milk received at the plant during the month that would have been producer milk if the plant had been fully regulated; and

(iii) The payments by the operator of the partially regulated distributing plant to the producer-settlement fund of another order under which such plant is also a partially regulated distributing plant and like payments by the operator of the nonpool supply plant if paragraph (b)(1)(iii) of this section applies.

§ 1126.77 Adjustment of accounts.

Whenever audit by the market administrator of any handler's reports, books, records, or accounts discloses adjustments to be made, for any reason, which result in monies due the market administrator from such handler, the market administrator shall promptly notify such handler of any such amount due, and payment thereof shall

be made on or before the next day for making payment set forth in the provision under which such error occurred. Any monies found to be due a handler from the market administrator shall be paid promptly to such handler, except that the market administrator shall offset any monies due a handler against monies due from such handler.

§ 1126.78 Charges on overdue accounts.

Any unpaid obligation of a handler pursuant to §§ 1126.71, 1126.73(g), 1126.76, 1126.77, or 1126.85 shall be increased three-fourths of 1 percent per month beginning on the first day after the due date, and on each date of subsequent months following the day on which such type of obligation is normally due, subject to the following conditions:

(a) The amounts payable pursuant to this section shall be computed monthly on each unpaid obligation, which shall include any unpaid interest charges previously computed pursuant to this section; and

(b) For the purpose of this section, any obligation that was determined at a date later than that prescribed by the order because of a handler's failure to submit a report to the market administrator when due shall be considered to have been payable by the date it would have been due if the report had been filed when due.

Administrative Assessment and Marketing Service Deduction

§ 1126.85 Assessment for order administration.

As his pro rata share of the expense of administration of the order, each handler shall pay to the market administrator on or before the 16th day after the end of the month 4 cents per hundredweight, or such lesser amount as the Secretary may prescribe, with respect to:

(a) Receipts of producer milk (including such handler's own production) other than such receipts by a handler described in § 1126.9(c) that were delivered to pool plants of other handlers or held in inventory at the end of the month;

(b) Receipts from a handler described in § 1126.9 (c);

(c) Other source milk allocated to Class I pursuant to § 1126.44(a) (7) and (11) and the corresponding steps of § 1126.44(b), except such other source milk that is excluded from the computations pursuant to § 1126.60 (d) and (f); and

(d) Route disposition from a partially regulated distributing plant in the marketing area that exceeds the skim milk and butterfat specified in § 1126.76 (a) (2).

§ 1126.86 Deduction for marketing services.

(a) Except as set forth in paragraph (b) of this section, the market administrator, in making payments to producers pursuant to § 1126.73, shall deduct 5 cents per hundredweight, or such lesser amount as the Secretary may prescribe, with respect to the milk of such producer (except a handler's own farm production for whom the marketing services set forth in this paragraph are not being performed by a cooperative association as determined by the Secretary. The monies shall be used by the market administrator to verify or establish weights, samples, and tests of producer milk and to provide producers with market information. The services shall be performed by the market administrator or an agent engaged by and responsible to him.

(b) In the case of producers for whom a cooperative association is actually performing the services set forth in paragraph (a) of this section, the market administrator

shall make, in lieu of the deduction specified in paragraph (a) of this section, such deductions from the payments to be made to such producers as may be authorized by the membership agreement or marketing contract between such cooperative association and such producers and on or before the 18th day after the end of each month shall pay such deductions to the cooperative association rendering such services, accompanied by a statement showing the quantity of milk for which a deduction was computed for each such producer.

ADVERTISING AND PROMOTION PROGRAM

§ 1126.110 Agency.

"Agency" means an agency organized by producers and producers' cooperative associations, on such form and with methods of operation specified in this part, which is authorized to expend funds made available pursuant to § 1126.121(b)(1), on approval by the Secretary, for the purposes of establishing or providing for establishment of research and development projects, advertising (excluding brand advertising), sales promotion, educational, and other programs, designed to improve or promote the domestic marketing and consumption of milk and its products. Members of the Agency shall serve without compensation but shall be reimbursed for reasonable expenses incurred in the performance of duties as members of the Agency.

§1126.111 Composition of Agency.

Subject to the conditions of paragraph (a) of this section, each cooperative association or combination of cooperative associations, as provided for under §1126.113(b), is authorized one Agency representative for each full percent of the participating member producers it represents. Cooperative associations with less than 5 percent of the

total participating producers which have elected not to combine pursuant to § 1126.113(b), and participating producers who are not members of cooperatives, are authorized to select from such group, in total, one Agency representative for each full 5 percent that such producers constitute of the total participating producers. If such group of producers in total constitutes less than 5 percent, it shall nevertheless be authorized to select from such group in total one Agency representative. For the purpose of determining the Agency's composition, all producers who have not requested refunds for the most recent calendar quarter under any order shall be considered as participating producers.

(a) If any cooperative association or combination of cooperative associations, as provided for under § 1126.113(b), has a majority of the participating producers, representation from such cooperative or group of cooperative, as the case may be, shall be limited to the minimum number of representatives necessary to constitute a majority of the Agency representatives.

§ 1126.112 Term of office.

The term of office of each member of the Agency shall be 1 year, or until a replacement is designated by the cooperative association or is otherwise appropriately elected.

§ 1126.113 Selection of Agency members.

The selection of Agency members shall be made pursuant to paragraphs (a), (b), and (c) of this section. Each person selected shall qualify by filing with the market administrator a written acceptance promptly after being notified of such selection.

(a) Each cooperative authorized one or more representatives to the Agency shall notify the market adminis-

trator of the name and address of each representative who shall serve at the pleasure of the cooperative.

(b) For purposes of this program, cooperative associations may elect to combine their participating memberships and, if the combined total of participating producers of such cooperatives is 5 percent or more of the total participating producers, such cooperatives shall be eligible to select a representative(s) to the Agency under the rules of § 1126.111 and paragraph (a) of this section.

(c) Selection of Agency members to represent participating nonmember producers and participating producer members of a cooperative association(s) having less than the required five (5) percent of the producers participating in the advertising and promotion program and who have not elected to combine memberships as provided in paragraph (b) of this section, shall be supervised by the market administrator in the following manner:

(1) Promptly after the effective date of this amending order, and annually thereafter, the market administrator shall give notice to participating producer members of such cooperatives and participating nonmember producers of their opportunity to nominate one or more Agency representatives, as the case may be, and also shall specify the number of representatives to be selected.

(2) Following the closing date for nominations, the market administrator shall announce the nominees who are eligible for Agency membership and shall conduct a referendum among the individual producers eligible to vote. The election to membership shall be determined on the basis of the nominee (or nominees) receiving the largest number of eligible votes. If an elected representative subsequently discontinues producer status or is otherwise unable to complete his term of office, the market administrator shall appoint as his replacement the par-

ticipating producer who received the next highest number of eligible votes.

§ 1126.114 Agency operating procedure.

A majority of the Agency members shall constitute a quorum and any action of the Agency shall require a majority of concurring votes of those present and voting.

§ 1126.115 Powers of the Agency.

The Agency is empowered to:

(a) Administer the terms and provisions within the scope of Agency authority pursuant to § 1126.110,

(b) Make rules and regulations to effectuate the purposes of Public Law 91-670;

(c) Recommend amendments to the Secretary; and

(d) With approval of the Secretary enter into contracts and agreements with persons or organizations as deemed necessary to carry out advertising and promotion programs and projects specified in §§ 1126.110 and 1126.117.

§ 1126.116 Duties of the Agency.

The Agency shall perform all duties necessary to carry out the terms and provisions of this program including, but not limited to, the following:

(a) Meet, organize, and select from among its members a chairman and such other officers and committees as may be necessary, and adopt and make public such rules as may be necessary for the conduct of its business;

(b) Develop programs and projects pursuant to §§ 1126.110 and 1126.117;

(c) Keep minutes, books, and records and submit books and records for examination by the Secretary and furnish any information and reports requested by the Secretary;

(d) Prepare and submit to the Secretary for approval prior to each quarterly period a budget showing the projected amounts to be collected during the quarter and how such funds are to be disbursed by the Agency;

(e) When desirable, establish an advisory committee(s) of persons other than Agency members;

(f) Employ and fix the compensation of any person deemed to be necessary to its exercise of powers and performance of duties;

(g) Establish the rate of reimbursement to the members of the Agency for expenses in attending meetings and pay the expenses of administering the Agency; and

(h) Provide for the bonding of all persons handling Agency funds in an amount and with surety thereon satisfactory to the Secretary.

§ 1126.117 Advertising, Research, Education, and Promotion Program.

The Agency shall develop and submit to the Secretary for approval all programs or projects undertaken under the authority of this part. Such programs or projects may provide for:

(a) The establishment, issuance, effectuation, and administration of appropriate programs or projects for the advertising and promotion of milk and milk products on a nonbrand basis;

(b) The utilization of the services of other organizations to carry out Agency programs and projects if the

Agency finds that such activities will benefit producers under this part; and

(c) The establishment, support, and conduct of research and development projects and studies that the Agency finds will benefit all producers under this part.

§ 1126.118 Limitation of expenditures by the Agency.

(a) Not more than 5 percent of the funds received by the Agency pursuant to § 1126.121(b)(1) shall be utilized for administrative expense of the Agency.

(b) Agency fund shall not, in any manner, be used for political activity or for the purpose of influencing governmental policy or action, except in recommending to the Secretary amendments to the advertising and promotion program provisions of this part.

(c) Agency funds may not be expended to solicit producers participation.

(d) Agency funds may be used only for programs and projects promoting the domestic marketing and consumption of milk and its products.

§ 1126.119 Personal liability.

No member of the Agency shall be held personally responsible, either individually or jointly with others, in any way whatsoever to any person for errors in judgment, mistakes, or other acts, either of commission or omission, of such member in performance of his duties, except for acts of willful misconduct, gross negligence, or those which are criminal in nature.

§ 1126.120 Procedure for requesting refunds.

Any producer may apply for refund under the procedure set forth under paragraphs (a) through (c) of this section.

(a) Refund shall be accomplished only through application filed with the market administrator in the form prescribed by the market administrator and signed by the producer. Only that information necessary to identify the producer and the records relevant to the refund may be required of such producer.

(b) Except as provided in paragraph (c) of this section, the request shall be submitted within the first 15 days of December, March, June, or September for milk to be marketed during the ensuing calendar quarter beginning on the first day of January, April, July, and October, respectively.

(c) A dairy farmer who first acquires producer status under this part after the 15th day of December, March, June, or September, as the case may be, and prior to the start of the next refund notification period as specified in paragraph (b) of this section, may, upon application filed with the market administrator pursuant to paragraph (a) of this section, be eligible for refund on all marketings against which an assessment is withheld during such period and including the remainder of the calendar quarter involved.

§ 1126.121 Duties of the market administrator.

Except as specified in § 1126.116, the market administrator, in addition to other duties specified by this part, shall perform all the duties necessary to administer the terms and provisions of the advertising and promotion program, including, but not limited to, the following:

(a) Within 30 days after the effective date of this amending order, and annually thereafter, conduct a referendum to determine representation on the Agency pursuant to § 1126.113(c).

(b) Set aside the amounts subtracted under § 1126.61(d) into an advertising and promotion fund, separately accounted for, from which shall be disbursed:

(1) To the Agency each month, all such funds less any necessary amount held in reserve to cover refunds pursuant to paragraph (b) (2) and (3) of this section, and payments to cover expenses of the market administrator incurred in the administration of the advertising and promotion program (including audit).

(2) Refund to producers the amounts of mandatory checkoff for advertising and promotion programs required under authority of State law applicable to such producers, but not in amounts that exceed a rate of 5 cents per hundredweight on the volume of milk pooled by any such producer for which deductions were made pursuant to § 1126.61(d).

(3) After the end of each calendar quarter, make a refund to each producer who has made application for such refund pursuant to § 1126.120. Such refund shall be computed at the rate of 5 cents per hundredweight of such producer's milk pooled for which deductions were made pursuant to § 1126.61(d) for such calendar quarter, less the amount of any refund otherwise made to the producer pursuant to paragraph (b) (2) of this section.

(c) Promptly after the effective date of this amending order, and thereafter with respect to new producers, forward to each producer a copy of the provisions of the advertising and promotion program (§§ 1126.110 through 1126.123).

(d) Make necessary audits to establish that all Agency funds are used only for authorized purposes.

§ 1126.122 Liquidation.

In the event that the provisions of this advertising and promotion program are terminated, any remaining uncommitted funds applicable thereto shall revert to the producer-settlement fund of § 1126.70.

§ 1126.123 Initial operating procedures under merger of orders.

Notwithstanding the provisions of §§ 1126.110 through 1126.122, the following procedures shall apply during the initial operation of the advertising and promotion program under this order amending and merging the Austin-Waco, Central West Texas, Corpus Christi, North Texas, San Antonio, and South Texas orders:

(a) During the first month in which this merged order is effective, the Agencies previously established under the advertising and promotion programs of the six above-listed orders shall continue to function as separate Agencies under this merged order. Such individual Agencies shall operate in accordance with the provisions of §§ 1126.110 through 1126.122, but subject to the following conditions:

(1) The composition of the Agencies as constituted under the six respective orders shall remain unchanged. Members serving on the respective Agencies immediately prior to the effective date of this amending order shall continue to serve on such Agencies except for any replacement of members in accordance with § 1126.113 (a) and (c)(2);

(2) The activities of the Agencies shall be limited to those programs set forth in § 1126.110 for which budgets have been approved by the Secretary and for which financial commitments were made prior to the effective date of this amending order; and

(3) The term of office of each member of each Agency shall expire at the end of the first month in which this merged order is effective;

(b) Within 30 days after the effective date of this amending order, a new single Agency shall be formed in accordance with §§ 1126.111 and 1126.113. Such Agency shall first become operative at the beginning of the second month in which this merged order is effective and at that time shall assume all advertising and promotion funds and obligations of the six individual Agencies provided for in paragraph (a) of this section;

(c) During the first month in which this merged order is effective, the monies set aside by the market administrator for advertising and promotion from proceeds of producer milk pooled in the preceding month under each of the six above-listed orders shall be disbursed to the respective Agencies provided for in paragraph (a) of this section;

(d) In making refunds of advertising and promotion assessments pursuant to § 1126.12 (b)(3), the market administrator shall honor all valid refund requests filed under the advertising and promotion programs of the six above-listed orders;

(e) Any dairy farmer who filed a valid request for refund of advertising and promotion assessments under any of the six above-listed orders for the calendar quarter in which this merged order became effective shall be eligible without refiling for refund of assessments on his producer milk under this merged order during such quarter; and

(f) Any producer who elected to particiapte in the advertising and promotion program of any of the six above-listed orders for the calendar quarter in which this merged

order became effective shall not be eligible to request a refund of the assessments against his deliveries of producer milk under the merged order until the next quarterly filing period.

(Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674)

Effective date July 1, 1975.

Signed at Washington, D.C., on May 28, 1975.

Richard L. Feltner,
Assistant Secretary.

[FR Doc. 75-14202 Filed 5-29-75;8:45 am]

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 19

No. 80-2101

D. C. Docket No. 75-B-102

SUNTEX DAIRY, ET AL.,
Plaintiffs-Appellants,

versus

JOHN R. BLOCK, Secretary of Agriculture
of the United States,
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Texas

Before TATE and WILLIAMS, Circuit Judges.*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

January 21, 1982

ISSUED AS MANDATE: Mar 1, 1982

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*Due to his death on December 22, 1981, Judge Ainsworth did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. §46(d).

APPENDIX H

(Filed February 17, 1982)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 80-2101

SUNTEX DAIRY, ET AL.,
Plaintiffs-Appellants,

versus

JOHN R. BLOCK,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion January 21, 1982, 5 Cir., 198.., ... F.2d .....).
(February 17, 1982)

Before TATE and WILLIAMS, Circuit Judges*.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

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*Due to his death on December 22, 1981, Judge Ainsworth did not participate in this decision. The petition for rehearing is being decided by a quorum. 28 U.S.C. 46(d).

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Albert Tate

United States Circuit Judge

CLERK'S NOTE:

SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

REHG-6

APPENDIX I

7 U.S.C.

§ 602. Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such production research, marketing research, and development projects provided in section 608c(6)(I) of this title, such container and pack requirements provided in section 608c(6)(H) of this title, such minimum standards of quality and maturity and such grading and inspection

requirements for agrictultural commodities enumerated in section 608c(2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

(5) Through the exercise of the power conferred upon the Secretary of Agriculture under this chapter, to continue for the remainder of any marketing season or marketing year, such regulation pursuant to any order as will tend to avoid a disruption of the orderly marketing of any commodity and be in the public interest, if the regulation of such commodity under such order has been initiated during such marketing season or marketing year on the basis of its need to effectuate the policy of this chapter.

May 12, 1933, c. 25, Title I, § 2, 48 Stat. 32; Aug. 24, 1935, c. 641, §§ 1, 62, 49 Stat. 750, 782; June 3, 1937, c. 296, §§ 1, 2(b), 50 Stat. 246, 247; Aug. 1, 1947, c. 425, § 1, 61 Stat. 707; July 3, 1948, c. 827, Title III, § 302(a), 62 Stat. 1257; Aug. 28, 1954, c. 1041, Title IV, § 401(a), 68 Stat. 906; Aug. 8, 1961, Pub.L. 87-128, Title I, § 141(1), 75 Stat. 303; Nov. 8, 1965, Pub.L. 89-330, § 1(a), 79 Stat. 1270; June 25, 1970, Pub.L. 91-292, § 1(1), 84 Stat. 333.

§ 608b. Marketing agreements; exemption from antitrust laws

In order to effectuate the declared policy of this chapter, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: *Provided,* That no such agreement shall remain in force after the termination of this chapter.

May 12, 1933, c. 25, Title I, § 8b, formerly § 8(2), 48 Stat. 34; Apr. 7, 1934, c. 103, § 7, 48 Stat. 528, renumbered and amended Aug. 24, 1935, c. 641, § 4, 49 Stat. 753; June 3, 1937, c. 296, § 1, 50 Stat. 246; June 30, 1947, c. 166, Title II, § 206(d), 61 Stat. 208.

§ 608c. Orders regulating handling of commodity
Issuance by Secretary

(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as in the current of interstate or foreign com-

merce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

Commodities to which applicable single commodities and separate agricultural commodities

(2) Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen pears, grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans, and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, Idaho, New York, Michigan, Maryland, New Jersey, Indiana, California, Maine, Vermont, New Hampshire, Rhode Island, Massachusetts, Connecticut, Colorado, Utah, New Mexico, Illinois, and Ohio, and not including fruits for canning or freezing other than pears, olives, grapefruit, cherries, cranberries, and apples produced in the States named above except Washington, Oregon, and Idaho), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing and not including potatoes for canning, freezing, or other processing), hops, honeybees, and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin): *Provided*, That no order issued pursuant to this section shall be effective as to any grapefruit for canning or freezing unless the Secretary of Agriculture determines, in addition to other findings and determinations required by this chapter, that the issuance of such order is approved or favored by the processors who, during a representative period determined by the Secretary, have been engaged in canning or freez-

ing such commodity for market and have canned or frozen for market more than 50 per centum of the total volume of such commodity canned or frozen for market during such representative period; and (B) any agricultural commodity (except honey, cotton, rice, wheat, corn, grain sorghums, oats, barley, rye, sugarcane, sugarbeets, wool, mohair, livestock, soybeans, cottonseed, flaxseed, poultry (but not excepting turkeys), eggs (but not excepting turkey hatching eggs), fruits and vegetables for canning or freezing, including potatoes for canning, freezing, or other processing, and apples), or any regional or market classification thereof, not subject to orders under (A) of this subdivision, but not the products (including canned or frozen commodities or products) thereof. No order issued pursuant to this section shall be effective as to cherries, apples, or cranberries for canning or freezing unless the Secretary of Agriculture determines, in addition to other required findings and determinations, that the issuance of such order is approved or favored by processors who, during a representative period determined by the Secretary, have engaged in canning or freezing such commodity for market and have frozen or canned more than 50 per centum of the total volume of the commodity to be regulated which was canned or frozen within the production area, or marketed within the marketing area, defined in such order, during such representative period. No order issued pursuant to this section shall be applicable to peanuts produced in more than one of the following production areas: the Virginia-Carolina production area, the Southeast production area, and the Southwest production area. If the Secretary determines that the declared policy of this chapter will be better achieved thereby (i) the commodities of the same general class and used wholly or in part for the same purposes may be combined and treated as a single commodity and (ii) the portion of an agricultural com-

modity devoted to or marketed for a particular use or combination of uses, may be treated as a separate agricultural commodity. All agricultural commodities and products covered hereby shall be deemed specified herein for the purposes of subsections (6) and (7) of this section.

Notice and hearing

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

Finding and issuance of order

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

Milk and its products; terms and conditions of orders

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased

from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided,* That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, (d) a further adjustment to encourage seasonal adjustments in the production of milk

through equitable apportionment of the total value of the milk purchased by any handler, or by all handlers, among producers on the basis of their marketings of milk during a representative period of time, which need not be limited to one year; (e) a provision providing for the accumulation and disbursement of a fund to encourage seasonal adjustments in the production of milk may be included in an order; and (f) a further adjustment, equitably to apportion the total value of milk purchased by all handlers among producers on the basis of their marketings of milk, which may be adjusted to reflect the utilization of producer milk by all handlers in any use classification or classifications, during a representative period of one to three years, which will be automatically updated each year. In the event a producer holding a base allocated under this clause (f) shall reduce his marketings, such reduction shall not adversely affect his history of production and marketing for the determination of future bases, or future updating of bases, except that an order may provide that, if a producer reduces his marketings below his base allocation in any one or more use classifications designated in the order, the amount of any such reduction shall be taken into account in determining future bases, or future updating of bases. Bases allocated to producers under this clause (f) may be transferable under an order on such terms and conditions, including those which will prevent bases taking on an unreasonable value, as are prescribed in the order by the Secretary of Agriculture. Provisions shall be made in the order for the allocation of bases under this clause (f)—

(i) for the alleviation of hardship and inequity among producers; and

(ii) for providing bases for dairy farmers not delivering milk as producers under the order upon becoming pro-

ducers under the order who did not produce milk during any part of the representative period and these new producers shall within ninety days after the first regular delivery of milk at the price for the lowest use classification specified in such order be allocated a base which the Secretary determines proper after considering supply and demand conditions, the development of orderly and efficient marketing conditions and to the respective interests of producers under the order, all other dairy farmers and the consuming public. Producer bases so allocated shall for a period of not more than three years be reduced by not more than 20 per centum; and

(iii) dairy farmers not delivering milk as producers under the order upon becoming producers under the order by reason of a plant to which they are making deliveries becoming a pool plant under the order, by amendment or otherwise, shall be provided bases with respect to milk delivered under the order based on their past deliveries of milk on the some[1] basis as other producers under the order; and

(iv) such order may include such additional provisions as the Secretary deems appropriate in regard to the reentry of producers who have previously discontinued their dairy farm enterprise or transferred bases authorized under this clause (f); and

(v) notwithstanding any other provision of this chapter, dairy farmers not delivering milk as producers under the order, upon becoming producers under the order, shall within ninety days be provided with respect to milk delivered under the order, allocations based on their past deliveries of milk during the representative period from the production facilities from which they are delivering milk under the order on the same basis as producers under the order on the effective date of order provisions autho-

rized under this clause (f): *Provided,* That bases shall be allocated only to a producer marketing milk from the production facilities from which he marketed milk during the representative period, except that in no event shall such allocation of base exceed the amount of milk actually delivered under such order.

The assignment of other source milk to various use classes shall be made without regard to whether an order contains provisions authorized under this clause (f). In the case of any producer who during any accounting period delivers a portion of his milk to persons not fully regulated by the order, provision shall be made for reducing the allocation of, or payment to be received by, any such producer under this clause (f) to compensate for any marketings of milk to such other persons for such period or periods as necessary to insure equitable participation in marketings among all producers. Notwithstanding the provisions of subsection (12) of this section and the last sentence of subsection (19) of this section, order provisions under this clause (f) shall not be effective in any marketing order unless separately approved by producers in a referendum in which each individual producer shall have one vote and may be terminated separately whenever the Secretary makes a determination with respect to such provisions as is provided for the termination of an order in subsection (16) (B) of this section. Disapproval or termination of such order provisions shall not be considered disapproval of the order or of other terms of the order.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit

or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

(H) Omitted.

(I) Establishing or providing for the establishment of research and development projects, and advertising (excluding brand advertising), sales promotion, educational, and other programs, designed to improve or promote the domestic marketing and consumption of milk and its products, to be financed by producers in a manner and at a rate specified in the order, on all producer milk under the order. Producer contributions under this subparagraph may be deducted from funds due producers in computing total pool value or otherwise computing total funds due producers and such deductions shall be in addition to the adjustments authorized by paragraph (B) of this subsection. Provision may be made in the order to exempt, or allow suitable adjustments or credits in connection with, milk on which a mandatory checkoff for advertising or marketing research is required under the authority of any State law. Such funds shall be paid to an agency organized by milk producers and producers' cooperative associations in such form and with such methods of operation as shall be specified in the order. Such agency may expend such funds for any of the purposes authorized by this subparagraph and may designate, employ, and allocate funds to persons and organizations engaged in such programs which meet the standards and qualifications specified in the order. All funds collected under this subparagraph shall be separately accounted for and shall be used only for the purposes for which they were collected. Programs authorized by this subparagraph may be either local or national in scope, or both, as provided in the order, but shall not be international. Order provisions under this subpara-

graph shall not become effective in any marketing order unless such provisions are approved by producers separately from other order provisions, in the same manner provided for the approval of marketing orders, and may be terminated separately whenever the Secretary makes a determination with respect to such provisions as is provided for the termination of an order in subsection (16) (B) of this section. Disapproval or termination of such order provisions shall not be considered disapproval of the order or of other terms of the order. Notwithstanding any other provision of this chapter, any producer against whose marketings any assessment is withheld or collected under the authority of this subparagraph, and who is not in favor of supporting the research and promotion programs, as provided for herein, shall have the right to demand and receive a refund of such assessment pursuant to the terms and conditions specified in the order.

Other commodities; terms and conditions of orders

(6) In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of

such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

(G) In the case of hops and their products, in addition to, or in lieu of, the foregoing terms and conditions, orders may contain one or more of the following:

(i) Limiting, or providing methods for the limitation of, the total quantity thereof, or of any grade, type, or variety thereof produced during any specified period or periods, which all handlers may handle in the current of or so as directly to burden, obstruct, or affect interstate or foreign commerce in hops or any product thereof.

(ii) Apportioning, or providing methods for apportioning, the total quantity of hops of the production of the then current calendar year permitted to be handled equitably among all producers in the production area to which the order applies upon the basis of one or more or a combination of the following: The total quantity of hops available or estimated will become available for market by each producer from his production during such period; the normal production of the acreage of hops operated by each producer during such period upon the basis of the num-

ber of acres of hops in production, and the average yield of that acreage during such period as the Secretary determines to be representative, with adjustments determined by the Secretary to be proper for age of plantings or abnormal conditions affecting yield; such normal production or historical record of any acreage for which data as to yield of hops are not available or which had no yield during such period shall be determined by the Secretary on the basis of the yields of other acreage of hops of similar characteristics as to productivity, subject to adjustment as just provided for.

(iii) Allotting, or providing methods for allotting, the quantity of hops which any handler may handle so that the allotment fixed for that handler shall be limited to the quantity of hops apportioned under preceding clause (ii) to each respective producer of hops; such allotment shall constitute an allotment fixed for that handler within the meaning of subsection (5) of section 608a of this title.

(H) Providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: *Provided, however,* That no action taken hereunder shall conflict with the Standard Containers Act of 1916 and the Standard Containers Act of 1928;

(I) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to

the marketing order: *Provided,* That with respect to orders applicable to almonds, California-grown peaches, cherries, papayas, carrots, citrus fruits, onions, Tokay grapes, pears, dates, plums, nectarines, celery, sweet corn, limes, olives, pecans, avocadoes, apples, or tomatoes, such projects may provide for any form of marketing promotion including paid advertising and with respect to almonds, and Florida Indian River grapefruit may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order and when the handling of any commodity for canning or freezing is regulated, then any such projects may also deal with the commodity or its products in canned or frozen form: *Provided further,* That the inclusion in a Federal marketing order of provisions for research and marketing promotion, including paid advertising, shall not be deemed to preclude, preempt or supersede any such provisions in any State program covering the same commodity.

(J) In the case of pears for canning or freezing, any order for a production area encompassing territory within two or more States or portions thereof shall provide that the grade, size, quality, maturity, and inspection regulation under the order applicable to pears grown within any such State or portion thereof may be recommended to the Secretary by the agency established to administer the order only if a majority of the representatives from that State on such agency concur in the recommendation each year.

Terms common to all orders

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) of this

section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States. There shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit or pears for canning or freezing one or more representatives of processors of the commodity specified in such order: *Provided*, That in a marketing order ap-

plicable to pears for canning or freezing the representation of processors and producers on such agency shall be equal.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5) to (7) of this section and necessary to effectuate the other provisions of such order.

Orders with marketing agreement

(8) Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: *Provided*, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order

must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

Orders with or without marketing agreement

(9) Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this chapter with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for

market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

Manner of regulation and applicability

(10) No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement.

Regional application

(11)(A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this chapter.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be,

which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

Approval of cooperative association as approval of producers

(12) Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

Retailer and producer exemption

(13)(A) No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under this chapter shall be applicable to any producer in his capacity as a producer.

Violation of order; penalty

(14) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than $50 or more than $500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: *Provided*, That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15) of this section.

Petition by handler for modification of order or exemption; court review of ruling of Secretary

(15)(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

Termination of orders and marketing agreements

(16)(A) The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order or such provision thereof.

(B) The Secretary shall terminate any marketing agreement entered into under section 608b of this title, or order issued under this section, at the end of the then cur-

rent marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: *Provided*, That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) The termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

Provisions applicable to amendments

(17) The provisions of this section and section 608d of this title applicable to order shall be applicable to amendments to orders: *Provided*, That notice of a hearing upon a proposed amendment to any order issued pursuant to this section, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof: *Provided further*, That if one-third or more of the producers as defined in a milk order apply in writing

for a hearing on a proposed amendment of such order, the Secretary shall call such a hearing if the proposed amendment is one that may legally be made to such order. Subsection (12) of this section shall not be construed to permit any cooperative to act for its members in an application for a hearing under the foregoing proviso and nothing in such proviso shall be construed to preclude the Secretary from calling an amendment hearing as provided in subsection (3) of this section. The Secretary shall not be required to call a hearing on any proposed amendment to an order in response to an application for a hearing on such proposed amendment if the application requesting the hearing is received by the Secretary within ninety days after the date on which the Secretary has announced his decision on a previously proposed amendment to such order and the two proposed amendments are essentially the same.

Milk prices

(18) The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that

the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk to meet current needs and further to assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

Producer or processor referendum for approving order

(19) For the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors, as required under the applicable provisions of this chapter, the Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers or processors, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. The terms and conditions of the proposed order shall be described by the Secretary in the ballot used in the conduct of the referendum. The nature, content, or extent of such description shall not be a basis for attacking the legality of the order or any action relating thereto. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection

(12) of this section. For the purpose of ascertaining whether the issuance of an order applicable to pears for canning or freezing is approved or favored by producers as required under the applicable provisions of this chapter, the Secretary shall conduct a referendum among producers in each State in which pears for canning or freezing are proposed to be included within the provisions of such marketing order and the requirements of approval or favor under any such provisions applicable to pears for canning or freezing shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of 66⅔ per centum except that in the event that pear producers in any State fail to approve or favor the issuance of any such marketing order, it shall not be made effective in such State.

May 12, 1933, c. 25, Title I, § 8c, as added Aug. 24, 1935, c. 641, § 5, 49 Stat. 753, and amended June 25, 1936, c. 804, 49 Stat. 1921; June 3, 1937, c. 296 §§ 1, 2(d), (e), (f), (k), (l), (m), 50 Stat. 246, 247; Aug. 5, 1937, c. 567, 50 Stat. 563; Apr. 13, 1938, c. 143, §§ 1, 2, 52 Stat. 215; May 31, 1939, c. 157, 53 Stat. 793; Feb. 10, 1942, c. 52, §§ 2, 3, 56 Stat. 85; 1947 Reorg. Plan No. 1, § 102, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; Aug. 1, 1947, c. 425, §§ 2, 4, 61 Stat. 707, 710; July 3, 1948, c. 827, Title III, § 302(b), (c), 62 Stat. 1258; June 29, 1949, c. 273, 63 Stat. 282; Aug. 28, 1954, c. 1041, Title IV, § 401(b)-(d), 68 Stat. 906; Aug. 8, 1961, Pub.L. 87-128, Title I, § 141(3), (4), 75 Stat. 304, 305; Sept. 27, 1962, Pub.L. 87-703, Title IV, § 403, 76 Stat. 632; Nov. 3, 1965, Pub.L. 89-321, Title I, §§ 101, 102, 79 Stat. 1197; Nov. 8, 1965, Pub.L. 89-330, § 1(b), 79 Stat. 1270; Feb. 20, 1970, Pub.L. 91-196, § 1, 84 Stat. 14; June 25, 1970, Pub.L. 91-292, § 1(2), 84 Stat. 333; July 18, 1970, Pub.L. 91-341, 84 Stat, 438; July 31, 1970, Pub.L. 91-363, 84 Stat.

687; Aug. 18, 1970, Pub.L. 91-384, 84 Stat. 827; Nov. 25, 1970, Pub.L. 91-522, 84 Stat. 1357; Nov. 30, 1970, Pub.L. 91-524, Title II, § 201(a), 84 Stat. 1359; Nov. 30, 1970, Pub.L. 91-524, Title II, § 201(f), as amended Aug. 10, 1973, Pub.L. 93-86, § 1(2)(B), 87 Stat. 222; Jan. 11, 1971, Pub.L. 91-670, Title I, § 101, Title II, § 201, 84 Stat. 2040, 2041; Aug. 13, 1971, Pub.L. 92-120, 85 Stat. 340; Feb. 15, 1972, Pub.L. 92-233, 86 Stat. 39; Oct. 6, 1972, Pub.L. 92-466, 86 Stat. 780; Dec. 29, 1973, Pub.L. 93-230, 87 Stat. 945. (Amendments of 1978, 1980 and 1981 not included above.)

5 U.S.C.

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

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1. So in original. Probably should read "same".

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

Supreme Court, U.S.
FILED
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No. 81-2005

In the Supreme Court of the United States

OCTOBER TERM, 1982

SUNTEX DAIRY, ET AL., PETITIONERS

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the Secretary of Agriculture's decision to merge six federal milk marketing order areas and some previously unregulated areas in Texas into a single marketing order area.

2. Whether the Secretary of Agriculture's decision, pursuant to Section 8c(9) of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 608c(9), to implement a consolidated milk marketing order is committed to agency discretion by law.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2098

SUNTEX DAIRY, ET AL., PETITIONERS

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 666 F.2d 158. The opinion of the district court (Pet. App. A21-A28) is unreported. A previous opinion of the court of appeals remanding the case for further consideration (Pet. App. A29-A42) is reported at 591 F.2d 1063. The initial opinion of the district court (Pet. App. A43-A52) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1982. A petition for rehearing was denied on February 17, 1982. The petition for a writ of certiorari was filed on May 12, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are a small group of Corpus Christi milk producers who object to the Secretary of Agriculture's decision to implement a federal milk marketing order that merges six milk marketing order areas and some additional unregulated areas in Texas into one marketing order area.[1]

1. The fundamental objective of the Agricultural Marketing Agreement Act of 1937 is to maintain orderly marketing conditions for milk and other specified agricultural commodities. 7 U.S.C. 602 and 608c(2). Federal milk marketing orders establish a uniform minimum price that must be paid to milk producers by handlers who process the raw milk. 7 U.S.C. 608c(5). Producers are the principal beneficiaries of the statutory scheme. *Friendship Dairies, Inc.* v. *Butz*, 432 F. Supp. 508, 515 (E.D.N.Y.), aff'd, 573 F.2d 1290 (2d Cir. 1977).

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[1]The six previously separate milk marketing orders in Texas were: South Texas, 7 C.F.R. Part 1121 (1975); North Texas, 7 C.F.R. Part 1126 (1975); San Antonio, 7 C.F.R. Part 1127 (1975); Central West Texas, 7 C.F.R. Part 1128 (1975); Austin-Waco, 7 C.F.R. Part 1129 (1975); and Corpus Christi, 7 C.F.R. Part 1130 (1975). Petitioners receive a lower price for their milk under the merged order than under the separate Corpus Christi order (Pet. 3).

The Secretary is authorized to adopt a proposed milk marketing order if evidence adduced at a public hearing supports the order and he concludes that promulgation of the order "will tend to effectuate the declared policy" of the statute. 7 U.S.C. 608c(4). The order becomes effective if it is approved by two-thirds of the affected producers, 7 U.S.C. 608c(8)(A) and (B), and at least 50% of the affected handlers enter into a marketing agreement incorporating the terms of the order. 7 U.S.C. 608c(8). If the affected handlers refuse to enter into a marketing agreement, the order may nonetheless be implemented if the Secretary determines that (1) the lack of handler approval "tends to prevent the effectuation of the declared policy of [the Act]" and (2) the order is "the only practical means of advancing the interests of the producers." 7 U.S.C. 608c(9)(A) and (B).[2]

2. In 1973, the Secretary proposed to merge six milk marketing order areas and some previously unregulated areas in Texas into a single new milk marketing order area. 38 Fed. Reg. 31432. On the basis of evidence adduced at a nine-day hearing, the Secretary promulgated the proposed merger order after finding that the order "will tend to effectuate the declared policy of the Act." 40 Fed. Reg. 20038 (1975). More than two-thirds of the affected producers approved the issuance of the order, but the required percentage of milk handlers refused to accept a marketing agreement

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[2]The Act expressly requires a hearing to determine whether the issuance of a proposed order will tend to effectuate the purposes of the Act. 7 U.S.C. 608c(3) and (4). The statute does not, however, require an additional hearing to support the Secretary's further determinations regarding the effect of handler refusal to approve the terms of an order. See 7 U.S.C. 608c(9) (A) and (B).

incorporating the terms of the proposed order.[3] The Secretary therefore invoked the provisions of Section 8c(9) of the Act, 7 U.S.C. 608c(9), and issued a final order based on a determination that (1) the handler refusal to accept the terms of the order "tends to prevent the effectuation of the declared policy of the Act" and (2) issuance of the merger order "is the only practical means pursuant to the declared policy of the Act of advancing the interests of producers * * *." 40 Fed. Reg. 23438 (1975).

3. Pursuant to 7 U.S.C. 608c(15)(B), petitioners sought judicial review of the Secretary's merger order in the United States District Court for the Southern District of Texas, alleging that the order was not supported by substantial evidence. Initially, the district court held that petitioners lacked standing to sue (Pet. App. A45–A49), but the court of appeals reversed and remanded (*id.* at A29–A42). On remand, the district court found that the conclusions of the Secretary were supported by substantial evidence (*id.* at A21–A28).

4. The court of appeals affirmed (Pet. App. A1–A20). The court first held that, contrary to petitioners' assertions, the Secretary's decision that the merger order tends to effectuate the policy of the Act was supported by substantial evidence and was not arbitrary, capricious, or an abuse of discretion (*id.* at A9). The court determined that the evidence fully justified the Secretary's finding that the six areas that previously had been regulated separately were "'substantially interrelated in both the distribution and procurement of milk'"

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[3] Milk handlers have never voted to approve a marketing agreement under the Act (Pet. App. A15).

(*id.* at A10) (footnote omitted). As the court noted, "[t]here was abundant evidence presented at the hearing from which the Secretary could conclude that the former six-market area was characterized by inter-market competition in distribution, common production areas, and common reserve supply" (*ibid.*).

The court further held that the Secretary's determination under Section 8c(9) of the Act to issue the merger order despite the refusal of the handlers to approve it was committed to the Secretary's discretion and was judicially reviewable only for "procedural irregularity or fraud" (Pet. App. A20). In reaching this conclusion the court relied on the Secretary's long-standing administrative construction of Subsection (9), the fact that courts are ill-equipped to second-guess the Secretary's determination of the necessity for the order under Subsection (9), and the fact that the Subsection (9) determination is not based on an evidentiary record beyond that created under 7 U.S.C. 608c(4) (Pet. App. A14–A19):

> On the basis of findings supported by substantial evidence that the order would tend to effectuate the purposes of the Act—and considering that the statutory scheme contemplates no further evidentiary hearing—we are unable to say that the judiciary could gainsay the Secretary's determination that the issuance of the order was the only practical means to effectuate the purposes of the Act when he finds that the requisite number of handlers have failed to enter into a voluntary agreement under 7 U.S.C. § 608c(8).

ARGUMENT

The court of appeals' decision is correct and does not conflict with a decision of any other court of appeals.

Accordingly, further review by this Court is unwarranted.

1. Petitioners contend that the Secretary's determination to merge the Corpus Christi marketing order with the other Texas market areas is not supported by substantial evidence (Pet. 15–18). Both courts below, however, rejected petitioners' argument that the merger order results from an improper "domino concept" (Pet. 15) and instead found that there was adequate record evidence to support the issuance of the order (Pet. App. A9–A10, A20, A24–A27). This factual issue clearly does not merit the attention of this Court. See *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

The Secretary found that a merger of the six Texas orders was justified by evidence demonstrating that (Pet. App. A59):

> [w]hen the six orders were promulgated, they regulated the handling of milk in areas that were generally distinguishable as separate markets for particular groups of producers. Changes in marketing practices since that time, however, have caused these separately regulated areas to become substantially interrelated in both the distribution and procurement of milk.

The evidence established that numerous handlers within the six separate order areas were engaged in "intermarket distribution" (*id.* at A60). The evidence also showed that (*id.* at A61):

> [a]ll of the six markets * * * [were] significantly involved in * * * overlapping supply areas. In May 1973, competition for milk supplies with at least

> one of the other regulated areas existed in 36 counties for the North Texas area, in 11 counties for the Central West Texas area, in 11 counties for the Austin-Waco area, in 15 counties for the San Antonio area, in 10 counties for the Corpus Christi area, and in 52 counties for the South Texas area.

Moreover, the evidence demonstrated that the six separate order areas resulted in an unequal division of the cost of market reserve supplies among the various milk producers in the affected areas (Pet. App. A61–A63).

The district court thoroughly reviewed the evidence underlying the Secretary's determinations and found that "the conclusion that a single order is the most appropriate method of effectuating the declared policy of the Act is reasonable in light of the record as a whole" (Pet. App. A27). The court of appeals also reviewed the record and found that "[t]here was abundant evidence presented at the hearing from which the Secretary could conclude that the former six-market area was characterized by intermarket competition in distribution, common production areas, and common reserve supply" (*id.* at A10; footnote omitted). These fact-bound determinations do not merit further review.

2. Petitioners contend (Pet. 6–15) that the Secretary's decision under Section 8c(9) of the Act to implement the merged milk marketing order despite the handlers' refusal to sign a marketing agreement is reviewable under either the substantial evidence or the arbitrary and capricious standard of review. They further contend that the Secretary's Subsection (9) determination must be made on the basis of record evidence adduced at either the original or a supplemental hearing (*ibid.*). The court of appeals correctly held that the

Subsection (9) determination need not be preceded by a supplemental hearing and that the determination itself is committed to the Secretary's discretion by law.

As the court of appeals recognized, there is no express preclusion of judicial review in the Act (Pet. App. A12). Nevertheless, "'an evaluation of the legislative scheme as well as the practical and policy implications demonstrate that review should not be allowed'" (*ibid.*, quoting *Bullard* v. *Webster*, 623 F.2d 1042, 1046 (5th Cir. 1980), cert. denied, 451 U.S. 907 (1981)). The court noted that the "committed to agency discretion" exception to judicial review is quite narrow (Pet. App. A12, citing *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971)). The court concluded, however, that "the determinations in question could not be subjected to any meaningful judicial review" because Section 8c(9) of the Act is drawn in such broad terms that there is, in effect, no law to apply (Pet. App. A13).

A milk marketing order may be issued under Section 8c(4) of the Act, 7 U.S.C. 608c(4), only if it is supported by evidence adduced at a public hearing. Moreover, the Secretary's findings under Subsection (4) are clearly subject to judicial review.[5] The decision to implement that order, however, is a discretionary decision not well-suited to judicial oversight. In the wake of han-

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[5]The court of appeals emphasized that its decision did not immunize the Secretary's actions from judicial scrutiny (Pet. App. A17):

> We do not intimate that the producers have no ability to get substantive review of the merits of the Secretary's determination. The Act's provision for review was interpreted also in our earlier decision in *Suntex Dairy* v. *Bergland*, 591 F.2d 1063 (5th Cir. 1979), to accord stand-

dlers' refusal to approve a marketing agreement, a marketing order may take effect only if the Secretary determines that (1) handler opposition "tends to prevent the effectuation of the declared policy of [the Act]" and (2) "the issuance of such order is the only practical means of advancing the interests of the producers." Section 8c(9) of the Act, 7 U.S.C. 608c(9). Wide-ranging discretion is necessarily involved in the Secretary's judgment on whether handler resistance "tends" to frustrate the purposes of the Act and whether the order is the only "practical" instrument to promote the producers' interests. The Secretary's judgment on either of these issues is simply not amenable to judicial review.

As the court of appeals stated, once a finding is made that an order will tend to effectuate the Act's purposes and policy, a finding that is reviewable and must be supported by substantial evidence, "it follows that failure by the handlers to approve such a marketing arrangement *prevents* effectuation of the policy of the Act. Judicial review of this determination could add nothing to the judicial review of the hearing provided by 7 U.S.C. § 608c(4), and such review would be duplicative and inefficient" (Pet. App. A13). As for ascertaining whether the order is the only practical means for advancing the producers' interests, the court held that issue to be equally unsuitable to judicial review, in part because the Act does not require additional evi-

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ing to producers to request a substantive review of the merits of the Secretary's decision in his [sub]section 8c(4) "tendency" determination.

dence after the Subsection (4) hearing,[6] and in part because the courts lack expertise to second-guess the Secretary's judgment (Pet. App. A19).[7]

The court's conclusion that the Subsection (9) determination is reviewable only for procedural irregularity or fraud is based on sound practical and legal considerations. Moreover, as the court acknowledged, handlers have never in the history of the Act voted to approve a marketing arrangement, and, until this case, the Subsection (9) finding "has always followed as a matter of course without further hearing or findings" (Pet. App. A15). The court properly was reluctant to intervene in this long-established administrative construction and application of the Act.

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[6] Because the Act does not contemplate the creation of an evidentiary record for the Subsection (9) determination, the court doubted that the judiciary could effectively review whether the issuance of an order was the "only practical means" to effectuate the purposes of the Act (Pet. App. A19).

[7] "With respect to determining whether there has been an error in the Secretary's judgment to issue a particular order, we consider the Byzantine nature of milk marketing regulation and we 'willingly confess our incapacity to contribute intelligently to the general course of decision' on federal milk marketing orders" (Pet. App. A18–A19, quoting *Hahn* v. *Gottlieb*, 430 F.2d 1243, 1249 (1st Cir. 1970)).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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No. 81-2098

IN THE

Supreme Court of the United States

October Term, 1981

SUNTEX DAIRY, ET AL., *Petitioners*,

vs.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE OF THE UNITED STATES, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF ASSOCIATED MILK PRODUCERS, INC., AMICUS CURIAE IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit erred in holding that the Secretary of Agriculture's decision to include the Corpus Christi Federal Milk Marketing Area in a merger of six Texas milk orders into a single federal milk order was supported by substantial evidence?

2. Whether the Fifth Circuit erred in concluding that the determination of the Secretary of Agriculture, made pursuant to 7 U.S.C. §§608c(9) (A)-(B), (a) that the refusal or failure of handlers to sign the Texas Milk Marketing Agreement tends to prevent effectuation of the declared policy of the Agricultural Marketing Agreement Act (7 U.S.C. §601 *et seq.*) and (b) that the issuance of the Texas Order, which amends and merges the six orders, is the only means pursuant to the declared policy of the Act of advancing the interests of the producers as defined in the order, was agency action "committed to agency discretion by law," unreviewable except for procedural irregularity or fraud?

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF ASSOCIATED MILK PRODUCERS, INC., AMICUS CURIAE IN OPPOSITION TO PETITION

Associated Milk Producers, Inc., *amicus curiae* herein, respectfully requests this Court to deny the petition for a writ of certiorari presented by Suntex Dairy, *et al.*, to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

INTEREST OF ASSOCIATED MILK PRODUCERS, INC., AMICUS CURIAE

Associated Milk Producers, Inc. (AMPI) is an agricultural cooperative of dairy farmers organized under the laws of the State of Kansas with its principal place of business in San Antonio, Texas. AMPI, as a qualified Capper-Volstead cooperative, 7 U.S.C. §291 *et seq.*, is the exclusive marketing representative of its member-producers, some of whom comprise approximately seventy percent (70%) of the producers pooled in the Texas Milk Marketing Area, Order No. 126, 7 C.F.R. §1126 *et seq.*

AMPI was the principal proponent of the Secretary of Agriculture's final order (40 F.R. 23437)[1] which provided for the merger of six previously independent federal milk marketing orders into a single order known as the Texas Milk Marketing Order No. 126, 7 C.F.R. §1126 *et seq.*, and which is the subject of the *Petition* herein. The six orders were merged in response to changes in the structure of the market and to assure the orderly marketing of milk in Texas. AMPI was permitted to file briefs and to participate in oral arguments as *amicus curiae* in support of the Secretary of Agriculture, respondent herein, in both the District Court and the Court of Appeals. November 20, 1979 *Order* of Hon. Robert O'Connor, Jr., United States District Court Judge for the Southern District of Texas; *Letter* of April 3, 1981 from Mr. Gilbert F. Ganucheau, Clerk of Court for the United States Court of Appeals for the Fifth Circuit; October 21,

[1] Reprinted in Appendix F (App. F) of petitioners' *Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit* dated May 11, 1982 (hereinafter *Petition*).

1981 *Order* of Hon. Albert Tate, Circuit Judge for the United States Court of Appeals for the Fifth Circuit.

As the representative of approximately 70 percent of the dairy farmers "pooled" under the Texas Milk Marketing Order No. 126, AMPI has a direct interest in the outcome of this *Petition*. AMPI's brief *amicus curiae* in opposition to the granting of the writ of certiorari sought by petitioners supports the decision of the Secretary of Agriculture, which was sustained on review by the District Court and affirmed by the Court of Appeals.

STATEMENT OF THE CASE

Petitioners brought this suit in the United States District Court, Southern District of Texas, against the United States Secretary of Agriculture (the Secretary). Petitioners are milk producers who objected to the Secretary's decision to merge the Corpus Christi regulated milk marketing area into a single regulated "Texas Milk Marketing Area," encompassing an area that, prior to the decision, was regulated under six separate "Federal Milk Orders."[2] Prior to the issuance of the merged "Texas Milk Marketing Area" Order (hereinafter "Order") in 1975, petitioners were regulated under the Corpus Christi Milk Marketing Order (formerly 7 C.F.R. §1130 *et seq.*).

Section 8c of the Agricultural Milk Marketing Act of 1937 (the Act), 7 U.S.C. § 608c, authorizes the Secretary to adopt "orders" regulating the handling of milk in specified marketing areas. Pursuant to such authority and in accordance with

[2] The six federal milk orders were: South Texas, North Texas, San Antonio, Central West Texas, Austin-Waco and Corpus Christi. (Formerly, 7 C.F.R. §§1121, 1126, 1127, 1128, 1129 and 1130, respectively.)

the regulations governing the adoption of proposed milk marketing orders, 7 C.F.R. §900 *et seq.*, the Secretary held a properly noticed[3] public hearing on the proposed merger of the six federal milk marketing orders in question.[4]

Nine days of public hearings[5] produced over 1600 pages of record evidence for the Secretary to consider in reaching his recommended decision entered on November 22, 1974. *See* 39 F.R. 18448. Following consideration of exceptions to his recommended decision, the Secretary issued a final decision setting forth "findings" and reasons supporting his decision directing the merger of the six milk marketing orders involved in this case. 40 F.R. 20004, *et seq.*, May 2, 1975, *Petition*, App. E. In accordance with §8c(4) of the Act, 7 U.S.C. §608c(4), the Secretary specifically found that the merged Order tended to "effectuate the declared policy of" the Act. 40 F.R. 20038, *Petition* at A221, App. E.

Thereafter, in accordance with §8c(9)(B) of the Act, 7 U.S.C. §608(c)(9)(B),[6] the Secretary conducted a referendum and determined that two-thirds of the affected producers approved of the final decision.[7] 40 F.R. 23438, *Petition* at

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[3] Notice of the hearing was published in the Federal Register on November 9, 1973. 38 F.R. 31432.

[4] AMPI submitted to the United States Department of Agriculture, Dairy Division, the proposal for merging the six federal milk marketing orders in question.

[5] The public hearings were held in Dallas, Texas, on December 3-7, 1973 and January 22-25, 1974.

[6] Section 8c(9)(B) of the Act, 7 U.S.C. §608c(9)(B), requires that before a final order may be issued by the Secretary, he must determine that at least two-thirds of the producers in the affected area approve of the issuance of the order.

[7] As a qualified Capper-Volstead cooperative, AMPI voted on behalf of its members, as authorized by the Act (7 U.S.C. §608c(12)), to approve the Secretary's decision to merge the six federal milk orders into one.

A226, App. F. The Secretary also made the "determinations" required by §§8c(9)(A) and (B) of the Act, 7 U.S.C. §§608c (9)(A)-(B), that the "refusal or failure of handlers . . . to sign a proposed marketing agreement, tends to prevent the effectuation of the declared policy of the Act," 40 F.R. 23438, *Petition* at A226, App. F, and that "[t]he issuance of the Texas Order . . . is the only practical means pursuant to the declared policy of the Act of advancing the interests of producers as defined in the Texas order." *Id.*

Petitioners sought judicial review pursuant to §8c(15)(B) of the Act, 7 U.S.C. §608c(15)(B), and charged in their original Complaint that (1) there was a lack of substantial evidence to support the Secretary's merger decision, and (2) the referendum was invalid because of AMPI's bloc vote which, according to petitioners, violated the Final Consent Judgment in *United States v. Associated Milk Producers, Inc.*, 394 F. Supp. 29 (W.D. Mo. 1975). The District Court's order, *Petition*, App. D, granting defendant Secretary's motion to dismiss for lack of standing was reversed by the United States Court of Appeals for the Fifth Circuit. *Suntex Dairy v. Bergland*, 591 F.2d 1063, 1067 (5th Cir. 1979), *Petition* at A40, App. C. The Fifth Circuit held that "[t]he milk producers have standing to seek substantive review of the Secretary's finding that a Texas-wide order should be effectuated . . ." *Id.*[8]

Upon remand the District Court granted summary judgment in favor of the Secretary and dismissed petitioners' Complaint. *Memorandum and Order* of August 4, 1980, *Peti-*

[8] As to AMPI's bloc vote, the Fifth Circuit held that while it may have violated the terms of the Missouri district court's injunction, the Secretary's milk order decision could not be invalidated on that ground. 591 F.2d at 1068, *Petition* at A41, App. C.

tion, App. B. The District Court held, as to the "primary issue before [the] Court," that "the Secretary's conclusion that the Corpus Christi market should be included in the Texas milk marketing area order is supported by substantial evidence in the record." *Id.* at A24. As to the alleged failure of the Secretary to make the requisite determinations that the refusal of handlers to sign the marketing agreement tends to prevent the effectuation of the declared policy of the Act and that the issuance of the order is the only practical means of advancing the interests of the producers, the District Court noted that "[t]he Secretary did enter the necessary finding . . . and for the aforesaid reasons the Court determines that there is substantial evidence in support of said finding." *Id.* at A27.

On petitioners' second appeal, the Fifth Circuit held that the Secretary's determination that the merged Order tended to effectuate the policy of the Act was supported by "abundant evidence" and was neither arbitrary, capricious, nor an abuse of discretion. *Suntex Dairy v. Block*, 666 F.2d 158, 162 (5th Cir. 1982), *Petition* at A10, App. A. The Fifth Circuit further held that the Secretary's "determinations" that the lack of handler approval tended to prevent the effectuation of the declared policy of the Act and that the issuance of the producer approved order was the only practical means of advancing the interests of the producers, were agency actions committed to the Secretary's discretion by law and were not reviewable by the courts except for procedural irregularity or fraud. 666 F.2d at 167, *Petition* at A20, App. A.

SUMMARY OF ARGUMENT

Petitioners do not assert any "special" or "important" reasons justifying the exercise of this Court's discretion to issue a writ of certiorari. The Supreme Court does not grant review by certiorari merely for the purpose of correcting "errors" of the lower courts.

The Secretary's decision to merge the six former Texas milk marketing orders into a single order was supported by substantial evidence on the record and the Fifth Circuit correctly so held. The "determinations" made by the Secretary pursuant to 7 U.S.C. §608c(9) were nonreviewable agency actions committed to the Secretary's discretion by law. The Fifth Circuit, in so holding, took great care to follow and correctly apply the mandates of *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). Moreover, the Secretary's "determinations" under 7 U.S.C. §608c(9), which does not require an evidentiary hearing to be held or "findings" to be made, are clearly neither arbitrary, capricious nor contrary to law, the appropriate standard of review in such a case.

ARGUMENT

I. PETITIONERS' FAILURE TO PUT FORTH ANY "SPECIAL" OR "IMPORTANT" REASONS JUSTIFYING THE EXERCISE OF THIS COURT'S DISCRETION TO ISSUE A WRIT OF CERTIORARI MANDATES THE DENIAL OF THEIR PETITION.

It is patent that review by this Court on writ of certiorari is not a matter of right, but rather is a matter entrusted to this Court's judicial discretion. *Cf.* Rule 17.1 with Rule 10,

Sup. Ct. R. The rules of this Court make clear that only those few petitions which set forth "special and important reasons" for the granting of a writ of certiorari will be granted by the Court. Rule 17.1, Sup. Ct. R. Notwithstanding this admonition, petitioners have totally failed to put forth *any* reasons in their *Petition* why a writ of certiorari should be granted, and instead merely reiterate and rephrase arguments previously presented to and rejected by both the District Court and the Court of Appeals. *See Petition* at 6-19.

Rule 17.1 of the Supreme Court Rules reads in pertinent part:

> A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are *special and important reasons* therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power or supervision.
>
> . . . .
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court. (Emphasis added)

While the above criteria are merely illustrative, they are indicative of the types of "reasons" relied on by this Court for the granting of a writ. Petitioners do not assert that the decision herein is in conflict with the decisions of other circuits or is contrary to any decisions of this Court. There is no conflict between the decision of the Fifth Circuit and any state court of last resort regarding a federal question and there has been no departure from the accepted and usual course of judicial proceedings by the Fifth Circuit. Manifestly, there is no important question of constitutional law requiring review by this Court. *See Petition* at 6-19. The closest petitioners come to asserting *any* reason whatsoever for granting their writ, are their conclusory allegations that "the United States Court of Appeals for the Fifth Circuit decided important issues of statutory construction not heretofore specifically determined by this Court" and that it "failed to adhere to the teachings of *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971)." *Petition* at 6.

In the body of their *Petition*, petitioners "amplify[] the reasons relied on for the allowance of the writ," Rule 21.1(j), Sup. Ct. R., by asserting precisely the same arguments on the merits made to and rejected by the Fifth Circuit. The identical "domino concept" theory of petitioners, *Petition* at 15-18, was presented to and rejected by the Fifth Circuit. *Petitioners' Fifth Circuit Brief* at 16; *see Suntex Dairy v. Block*, *supra*, at 163, *Petition* at A10, App. A. Similarly, petitioners' argument that the Fifth Circuit misconstrued the Agricultural Marketing Agreement Act of 1937, *Petition* at 7, essentially restates their previously made argument that the Secretary's determinations under §8c(9) of the Act, 7 U.S.C. §608c(9), were arbitrary, capricious, unsupported by substantial evi-

dence and not in accordance with law. *See Petitioners' Fifth Circuit Brief* at 40-43. This argument was also rejected by the Fifth Circuit. 666 F.2d at 167, *Petition* at A19, App. A.

As clearly evidenced by their *Petition*, petitioners' "reasons" for seeking a writ of certiorari amount to nothing more than an assertion by them that the Fifth Circuit committed "error" in its decision. *See, e.g., Petition* at 15, 17, 18. Such an assertion is simply inadequate as a matter of law to invoke the jurisdiction of this Court by means of a writ of certiorari. As stated by Chief Justice Fred M. Vinson, "The Supreme Court is not, and never has been primarily concerned with the correction of errors in lower court decisions." Address of Chief Justice Vinson to the American Bar Association, September 7, 1949 (*Address*), 69 S.Ct. V, VI. Furthermore, "[t]he jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923); Stern and Grossman, *Supreme Court Practice*, (5th ed. 1978) at 257-258.

Other than some bald assertions to the effect that this case involves important issues or questions, petitioners have wholly failed to demonstrate any "reason" why it might be deemed important for the Court to hear and decide this case. The Supreme Court "do[es] not grant a [writ of] certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). As Chief Justice Vinson noted almost 33 years ago, "to remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved." *Address, supra*, 69 S.Ct. at VI. The present *Petition* fails to present any questions of such importance.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE SECRETARY'S DETERMINATIONS WERE SUPPORTED BY SUBSTANTIAL EVIDENCE AND WERE NEITHER ARBITRARY, CAPRICIOUS NOR CONTRARY TO LAW.

In addition to their failure to provide any *reasons* for granting the requested writ of certiorari,[9] petitioners allege "error" on the part of the Fifth Circuit for its rejection of the same arguments petitioners are now attempting to put before this Court. *Petition* at 6-19. Contrary to petitioners' allegations, the Fifth Circuit correctly held that: (1) the Secretary's decision to merge the six milk orders into a single order was supported by substantial evidence on the record and was neither arbitrary, capricious nor contrary to law; and (2) the determinations made by the Secretary pursuant to §8c(9) of the Act, 7 U.S.C. §608c(9), were agency actions committed to the discretion of the Secretary by law and were thus unreviewable.

A. The Secretary's Decision To Merge The Corpus Christi Milk Order With The Other Five Milk Orders To Form The Texas Milk Marketing Order Was Based Upon Substantial Evidence On The Record.

One of the "reasons" (*Petition* at 15) petitioners present to support the granting of their petition is that the Fifth Circuit

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[9] As evidence of the fact that petitioners' "reasons" are nothing more than arguments on the merits, compare their "Questions Presented" (merits of the case) with their "Reasons for Granting Writ" (non-merits arguments demonstrating why case is important). *Petition* at i, 6, 15. As such a comparison makes clear, the first and second "reasons" are merely restatements of the first and second "questions," respectively.

"erred" in upholding the Secretary's decision to merge the six milk orders into one. Both the "domino concept" theory, *Petition* at 15-18, and the argument that there must be a "substantial interrelationship" between the Corpus Christi Order and each of the former orders prior to merger, *Petition* at i, 16, were presented to and rejected by the Fifth Circuit. *Petitioners' Fifth Circuit Brief* at 16; 666 F.2d at 162, *Petition* at A10, App. A. Both of these arguments here, as below, simply ignore the fact that the Secretary's determinations were supported by substantial evidence on the record and were neither arbitrary nor capricious. Moreover, it is not the function of this Court to determine the adequacy of the Court of Appeals' review of the Secretary's determinations. *Mobil Oil Corp. v. Federal Power Commission*, 417 U.S. 283, 309 (1974).

The "substantial evidence" standard of review of agency action, 5 U.S.C. §706(2)(E), requires only that an agency determination be supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938); *United States v. Mills*, 315 F.2d 828, 838 (4th Cir.), *cert. denied sub nom. Willow Farms Dairy, Inc. v. Freeman*, 374 U.S. 832 (1963) (the Secretary need only make a "reasoned" order).

The "arbitrary and capricious" standard of review, 5 U.S.C. §706(2)(A), is a more narrow standard and permits the reviewing court merely to determine whether the agency considered "the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, *supra*, at 416; *Camp v. Pitts*, 411 U.S. 138, 141 (1973). In the present case, the Fifth Circuit found that "[t]here was [substantial] evidence presented at the hear-

ing[10] from which the Secretary" could find that the merger of the six orders into one "tended to effectuate" the policy of the Act. 666 F.2d at 162, *Petition* at A10, App. A; *see* 40 F.R. 20005-007, *Petition* at A59-A73, App. E.

While petitioners make certain bald assertions in their *Petition* in an attempt to convince the Court of the "importance" of their case, *Petition* at 18,[11] it is apparent that their complaint here, as below, is not with the lack of evidence to support the Secretary's findings, but with the analysis and conclusions reached by the Secretary based on that evidence. However, such a disagreement with the Secretary's reasoning simply does not raise a substantial evidence question.[12] *Florida Sugar Cane League, Inc. v. Usery*, 531 F.2d 299, 303 (5th Cir. 1976).

A more fundamental problem with petitioners' "domino concept" theory, is the fact that it simply is not the responsibility of this Court to determine whether agency findings are supported by substantial evidence. *Mobil Oil Corp. v. Federal Power Commission, supra*, at 309. "Whether on the

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[10] It should be noted that the petitioners did not appear at the rule-making hearing though they had notice of the hearing and were afforded the opportunity to present evidence opposing the Corpus Christi merger. *See* 40 F.R. 20005, *Petition* at A59, App. E.

[11] Petitioners' failure to set forth any "reasons" for granting a writ of certiorari cannot be overcome by merely asserting that "[T]his matter also involves an important question of federal law and statutory construction." *Petition* at 18. As that same sentence of the *Petition* makes clear, the petitioners' only basis for requesting a writ of certiorari is the alleged "error of the Secretary and the Courts below." *Id. See* discussion, *supra*, at 10.

[12] As previously noted, the Order promulgated by the Secretary in the present case was based on the record produced at the hearings required by 7 U.S.C. §608c(3). The substantial evidence test is the appropriate standard to apply when reviewing findings of an agency made upon a hearing record. *Camp v. Pitts, supra*, at 141.

record as a whole there is substantial evidence to support an agency's findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 491 (1951); *accord, Mobil Oil Corp. v. Federal Power Commission, supra*, at 310. This clearly is not such a rare instance.

B. The Secretary's Determination That The Failure Or Refusal Of The Handlers To Approve The New Texas Order Tends To Prevent Effectuation Of The Policy Of The Act And That The Issuance Of The Merger Order Is The Only Practical Means Of Advancing The Interest Of Producers Was Neither Arbitrary, Capricious Nor Contrary To Law And Is Unreviewable Agency Action Committed To Agency Discretion By Law.

Petitioners argue that the Fifth Circuit "erred" in holding that the Secretary's determinations pursuant to §8c(9) of the Act, 7 U.S.C. §608c(9), were agency actions, unreviewable except for either "procedural irregularity or fraud." *Petition* at 6. Specifically, petitioners argue first, that the Fifth Circuit "misconstrued" the Act and, second, that it failed to "apply the teachings of *Overton Park* with sufficient fidelity." *Petition* at 7, 14. As will be seen, neither of these arguments on the *merits* warrants review by this Court of the present case.

1. The Fifth Circuit Correctly Held That The Secretary Fully Complied With The Mandates Of The Act.

Section 8c(9) of the Act, 7 U.S.C. §608c(9), provides that an order may become effective notwithstanding the refusal or failure of handlers to sign a marketing agreement if the Secretary *determines* that: "(A) . . . the refusal or failure . . . tends to prevent the effectuation of the declared policy of [the Act] . . . , and (B) [t]hat the issuance of such order is the only practical means of advancing the interests of the producers . . . pursuant to the declared policy. . . ." Petitioners assert that the determinations made by the Secretary, *Petition* at A226, App. F, pursuant to §8c(9) of the Act, 7 U.S.C. §608c(9), were not made in accordance with the "statutory scheme" and are thus, erroneous. *Petition* at 6-12.

It is patent that the Secretary is required only to "determine" that the effectuation of the Act's policy and the "interests of the producers" require that an order issue regulating the handling of milk in the marketing area under consideration. 7 U.S.C. §608c(9). That "determination,"[13] made after a hearing with the benefit of an evidentiary record, is governed by the same considerations that impelled the Secretary, in the first instance, to convene a hearing. *See* 7 U.S.C. §608c(3). Section 8c(3) of the Act, 7 U.S.C. §608c(3), empowers the Secretary to issue a notice of hearing "[w]henever [he] has reason to believe that the issuance of an order will

[13] The argument by petitioners that "there is no suggestion in Subsection 9 that the Secretary's determinations are not to be based on evidence taken at the prior hearing," *Petition* at 8, is specious. Section 8c(9) of the Act, 7 U.S.C. §608c(9), places no limitations as to what the Secretary may consider in making his "determinations" and thus, the Secretary can, and probably does, consider the evidence introduced at the hearing called under 7 U.S.C. §608c(3).

tend to effectuate the declared policy of [the Act]." The Secretary's "reason to believe" determination is, clearly, a discretionary one that does not require an "evidentiary basis," but is committed to the Secretary's sound discretion.

The various errors ascribed to the Fifth Circuit by petitioners indicate the extent to which they misconstrue the language and purpose of 7 U.S.C. §608c(9). The unsupported assertion that §8c(9) requires a second evidentiary hearing and "findings" to be made by the Secretary, *Petition* at 8, ignores the plain language of that section, which nowhere calls for a second hearing or for "findings." *See* 7 U.S.C. §608c(9). All the Secretary is required to do under that section is to make the above referenced "determinations." *Id.* By comparison, the Secretary is required to make "findings" under §8c(4) of the Act, 7 U.S.C. §608c(4).[14] Congress clearly knew how to require "findings" based upon evidence produced at a hearing, and did so in 7 U.S.C. §608c(4). Petitioners' attempt to attribute to Congress such "carelessness" by failing to so state its desire to have a second evidentiary hearing under 7 U.S.C. §608c(9), simply cannot be squared with the plain language of the Act.[15]

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[14] The Secretary clearly understood the distinction between the "findings" and the "determinations" he was required to make herein as evidenced by his *Order Amending and Merging Orders*, May 28, 1975, 40 F.R. 23437, *et seq.*, *Petition* at A224-A226, App. F.

[15] The further argument that the paranthetical "findings" language contained in 7 U.S.C. §608c(4) "refers to the Subsection 9 findings in question," *Petition* at 8, is patently incorrect. Aside from the fact that 7 U.S.C. §608c(9) does not require any "findings" to be made, the "findings" required under 7 U.S.C. §608c(4) must be made *prior to* the issuance of an order—subsection 8c(9) of the Act comes into play only *after* an order has been issued.

2. The Fifth Circuit Correctly Applied The Teachings Of *Overton Park* In Holding That The Secretary's §8c(9) Determinations Were Agency Actions, Unreviewable Except For Procedural Irregularity Or Fraud.

The major "error" attributed to the Fifth Circuit by petitioners is that court's holding that the Secretary's determinations (a) that lack of handler approval tended to prevent effectuation of the declared policy of the Act, and (b) that the issuance of the producer approved order was the only practical means of advancing the interest of producers,[16] were agency actions entrusted to the Secretary's discretion by law, not reviewable by the courts except for fraud or procedural irregularity. 666 F.2d at 167, *Petition* at A20, App. A. To prevent a grant of "administrative absolutism" to the Secretary, *Petition* at 10, petitioners argue that these determinations *should be* subject to review under at least the arbitrary, capricious or abuse of discretion tests. *Id.* at 14-15.

Section 10 of the Administrative Procedure Act, 5 U.S.C. §§701-706, provides that judicial review of agency action is to be available to any person aggrieved "except to the extent that—agency action is committed to agency discretion by law." 5 U.S.C. §701(a)(2). In *Citizens To Preserve Overton Park, Inc. v. Volpe, supra,* at 410, this Court held that the "committed to agency discretion" exception applies

> in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply."

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[16] The Act's primary purpose is to promote the interests of *producers*. 7 U.S.C. §601; H.R. Rep. No. 1241, 74th Cong., 1st Sess. 7 (1935); S. Rep. No. 1011, 74th Cong., 1st Sess. 3 (1935); *Friendship Dairies, Inc. v. Butz,* 432 F. Supp. 508, 515 (E.D.N.Y.), *aff'd,* 573 F.2d 1290 (2d Cir. 1977).

Accord, Ness Investment Corp. v. United States Department of Agriculture, 512 F.2d 706, 716 (9th Cir. 1975). Petitioners assert that the Fifth Circuit, in holding that the determinations made by the Secretary pursuant to 7 U.S.C. §608c(9) were committed to agency discretion by law, "failed to follow the mandates of *Overton Park*." *Petition* at 15.

Apart from the fact that this "error" of the Fifth Circuit is inadequate as a matter of law to entitle petitioners to review by writ of certiorari,[17] it is also plainly inaccurate. The Fifth Circuit very carefully and correctly considered and applied the *Overton Park* decision to the present case and held that "7 U.S.C. §608c(9)(B) imposes no 'limits [on the] agency's discretion to act in the manner which is challenged.'" 666 F.2d at 164, *Petition* at A14, App. A (quoting *City of Santa Clara, Cal. v. Andrus*, 572 F.2d 660, 666 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978)). In the present case, there simply "'is no law to be applied,'" *id.*, and thus, the "committed to agency discretion" exception is fully applicable. *Citizens To Preserve Overton Park, Inc. v. Volpe*, *supra*, at 410.[18]

The decision of the Fifth Circuit evidences the painstaking care taken by it in applying the relevant law (including *Overton Park*) to the facts of the present case prior to concluding that the Secretary's "determinations" made pursuant to §8c

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[17] The Supreme Court does not grant a writ of certiorari to correct mere "errors" of the lower courts. *See* discussion, *supra*, at 12-13.

[18] The two cases cited by petitioner for the proposition that the Fifth Circuit "plainly misapplied the *Overton Park* rationale," *Petition* at 12, are inapposite to the present case since each dealt with the preclusion of judicial review pursuant to 5 U.S.C. §701(a)(1), not with the "committed to agency discretion" exception of 5 U.S.C. §701(a)(2). *See Morris v. Gressette*, 432 U.S. 491 (1977); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

(9) of the Act, 7 U.S.C. §608c(9), were "not subject to [its] review."[19] 666 F.2d at 164, *Petition* at A14, App. A. As the Fifth Circuit stated, "the Secretary is directed to determine, *without the development of an additional evidentiary record*, the necessity of the proposed order," under 7 U.S.C. §608c(9). 666 F.2d at 164, *Petition* at A14, App. A (emphasis in original). Without such additional evidence, the courts "are ill-equipped to examine the Secretary's" section 9 determinations. *Id.* at 165, A15. Furthermore, the Fifth Circuit's view of the discretionary nature of the Secretary's determinations pursuant to 7 U.S.C. §608c(9), finds support in the fact that the Act has been consistently so administered since its enactment. *Id.*; *see, e.g., United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 547 (1939); *H.P. Hood & Sons, Inc. v. United States*, 307 U.S. 588, 592 (1939).

Petitioners "conclude" here, as below, that the Secretary's determinations made pursuant to 7 U.S.C. §608c(9) are "subject to judicial review on either the 'substantial evidence' standard or the 'arbitrary, capricious or abuse of discretion' standard, or on both standards." *Petition* at 14. The "substantial evidence" test is the appropriate standard to apply when reviewing findings of an agency made upon a hearing record, *Camp v. Pitts, supra*, at 141, but not where, as here, a statutory power is granted in such broad terms as to permit action upon an administrator's "determination" that the action will "tend to effectuate" a declared statutory policy. To the extent that the Secretary's §8c(9) "determinations," made

[19] The contention by petitioners that judicial review is "urgently required" to prevent the Secretary, once producer approval is obtained, from effectuating the proposed order "without further reflection or discretionary encumbrances," *Petition* at 11-12, simply ignores the "encumbrances" mandated by 7 U.S.C. §§608c(8) and (9).

without the aid of any additional hearings, are reviewable at all, they may be set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A); *see Camp v. Pitts, supra.* In view of the record before the Secretary, his "determination" that the issuance of the merger order would tend to effectuate the declared policy of the Act and was the "only practical means . . . of advancing the interests of producers" cannot be rejected as arbitrary or unreasonable, and it is, clearly, a determination that he could lawfully make.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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